91-406

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BRUCE L. WALLACE,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of the City of Norfolk, Virginia

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PETITION FOR A WRIT OF CERTIORARI

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September 5, 1991

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QUESTIONS PRESENTED

1. Whether railroad locomotive cab noise exposure standards promulgated by the Federal Railroad Administration ("FRA"), the federal agency charged by Congress with setting all safety standards for the rail industry, preempt application of generic noise standards promulgated by the Occupational Safety and Health Administration ("OSHA")?

2. Whether the court below erred in allowing the plaintiff, a locomotive engineer who alleges occupationally induced hearing loss, to introduce generic OSHA noise exposure regulations as evidence of the appropriate standard of care, and in instructing the jury that it could consider noncompliance with the OSHA regulations as evidence of negligence, when the FRA has issued specific locomotive cab noise regulations, which differ from the generic OSHA standards?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the case contains the names of all parties.

Petitioner Southern Railway Company (recently renamed Norfolk Southern Railway Company) is wholly owned by Norfolk Southern Corporation. The other subsidiaries and affiliates of petitioner are:

Arrowood-Southern Corporation Company
Arrowood-Southern Executive Park, Inc.
Atlantic Investment Company
Charlotte-Southern Hotel Corporation
Lamberts Point Barge Company, Inc.
Lamberts Point Docks, Inc.
Nickel Plate Improvement Company, Inc.
Norfolk and Western Railway Company
Norfolk Southern Industrial Development Corporation
Sandusky Dock Corporation
Virginia Holding Corporation
Norfolk Southern Properties, Inc.
North American Van Lines, Inc.
NS Fiber Optics, Inc.
NS Transportation Brokerage Corporation
NW Equipment Corporation
Pocahontas Development Corporation
Pocahontas Land Corporation
Triple Crown Services, Inc.
Wheelersburg Coal Terminal Company
Camp Lejune Railroad Company
Central of Georgia Railroad Company
Chattanooga Station Company
Chattanooga Terminal Railway Company
Chesapeake Western Railway Company
Cincinnati New Orleans and Texas Pacific Railway Company
Citico Realty Company
Elberton Southern Railway Company

Georgia Midland Railway Company
Georgia Northern Railway Company
Georgia Southern and Florida Railway Company
Highpoint, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Lake Erie Dock Company
Live Oak, Perry and South Georgia Railway Company
Louisiana Southern Railway Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
National Investment Company
New Orleans Terminal Company
Norfolk and Portsmouth Belt Line Railroad Company
North Carolina Midland Railroad Company
Shenandoah-Virginia Corporation
St. Johns River Terminal Company
South Western Rail Road Company
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Railway-Carolina Division
Southern Region Coal Transport, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Toledo Belt Railway Company
Transylvania Railroad Company
Virginia and Southwestern Railway Company
Wabash Railroad Company
Yadkin Railroad Company

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Petition for a Writ of Certiorari to the Circuit Court of the City of Norfolk, Virginia

---

PETITION FOR A WRIT OF CERTIORARI

The Southern Railway Company ("Southern") hereby petitions for a writ of certiorari to review the decision of the Circuit Court of the City of Norfolk, Virginia.

OPINIONS BELOW

The judgment of the Circuit Court of the City of Norfolk (App. 1a-2a, *infra*), filed without opinion, is not reported. The orders of the Virginia Supreme Court denying the petition for appeal (App. 8a, *infra*) and denying the petition for rehearing (App. 9a, *infra*) are not reported.

JURISDICTION

The judgment of the Circuit Court of the City of Norfolk was entered September 17, 1990. The order of the Virginia Supreme Court denying Southern's petition for appeal was entered on February 27, 1991. The order of that court denying Southern's petition for rehearing was

entered on June 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Section 202 of the Federal Railroad Safety Act of 1970 provides in pertinent part:

> The Secretary of Transportation . . . shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. . . .

45 U.S.C. § 431(a).

Section 6(b) of the Occupational Safety and Health Act of 1970 ("OSH Act") provides in pertinent part:

> "the Secretary [of Labor] may by rule promulgate, modify, or revoke any occupational safety or health standard . . .

29 U.S.C. § 655(b).

Section 4(b)(1) of the OSH Act provides in pertinent part:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1).

STATEMENT

A. Federal Regulation of Workplace Safety

Workplace safety regulation is carried out by a profusion of federal, state and local governmental agencies. At the federal level the Occupational Safety and Health Administration ("OSHA"), a division of the Department

of Labor, is the general author and administrator of workplace safety standards. *See* 29 U.S.C. § 653(a) (OSH Act applies to all employment performed in workplaces in the several states). OSHA's jurisdiction is not exclusive, however; there also exist a number of industry-specific federal agencies, whose broad regulatory authority over particular industries includes the power to set workplace safety standards.[1]

The existence of multiple regulators raises the specter of inefficient duplication of efforts and inconsistent regulatory schemes with resulting uncertainty as to which standards apply. It was just such confusion and inefficiency that Congress sought to avoid in enacting section 4(b)(1) of the OSH Act, which bars OSHA from regulating "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1).[2]

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[1] These include, *inter alia*, the Federal Aviation Administration, the Office of Pipeline Safety, the Coast Guard, and the Federal Railroad Administration ("FRA"), the federal agency whose regulations are at issue here.

[2] The Senate Report explained that the OSH Act

> does not modify other Federal laws prescribing safety and health standards. The bill does not authorize the Secretary of Labor to assert authority under this bill over particular working conditions regarding which another Federal agency exercises statutory authority to prescribe or enforce standards affecting occupational safety and health.

S. Rep. No. 91-1282, 91st Cong., 2d Sess. 22, reprinted in 1970 U.S.C.C.A.N. 5177, 5199. Similarly, in recommending the Conference Report, Representative Steiger noted that the "terms of the bill will apply to all businesses having an effect on commerce except where another Federal Agency other than the Department of Labor is exercising statutory authority to prescribe or enforce occupational safety and health standards or regulations." 116 Cong. Rec. 42,206 (1970). *See also Donovan v. Texaco, Inc.*, 720 F.2d 825, 827 (5th Cir. 1983) ("Section 4(b)(1) evidences a general Con-

During the last fifteen years there has been a considerable amount of litigation in both state and federal courts (and before the affected federal agencies) as to (1) what action the "other" federal agency must take to effect preemption of generic OSHA regulations, and (2) the scope of preemption, that is, the scope of the "working conditions" which the dominant agency carves out of OSHA's jurisdiction by the exercise of its independent statutory authority. To date, no consensus has emerged on either issue. On the first issue some circuits require only that the dominant agency assert its authority in a policy statement, *see, e.g., Velasquez v. Southern Pac. Transp. Co.*, 734 F.2d 216, 218 (5th Cir. 1984), while others require actual promulgation of a competing regulation, *see, e.g., Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 915-16 & n.7 (3rd Cir. 1980). The courts that have addressed the second issue diverge on whether the term "working conditions" in section 4(b)(1) contemplates a "discrete environment" (e.g., a locomotive cab), *see, e.g., Southern Railway v. OSHRC*, 539 F.2d 335, 338-39 (4th Cir. 1976), or a "discrete hazard" within that environment (e.g., noise exposure in a locomotive cab), *see, e.g., Southern Pac. Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976) *cert. denied*, 434 U.S. 874 (1977).

B. Federal Occupational Noise Exposure Regulation

This case turns on which of two federal noise exposure standards is applicable to railroad locomotive cab employees. Prior to 1973, no federal noise exposure standards existed. In that year, OSHA promulgated noise exposure regulations generally applicable to all workers in all industries, which consist primarily of a table of time-weighted averages of permissible noise exposure—as noise levels increase, the time that employees can be

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gressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion, governmental proliferation, and stultification of enterprise.").

exposed to the noise sources decreases. *See* 29 CFR § 1910.95 (1990).[3]

The FRA, the agency charged by Congress with setting railroad safety standards, also regulates occupational noise. The FRA is empowered by the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421, *et seq.*,[4] to conduct research and prescribe standards "for all areas of railroad safety." *Id.* § 431(a).[5] During the late-1970's and early 1980's, the FRA and other divisions of the Department of Transportation studied the effects of locomotive noise on railroad employees.[6] In 1978, the FRA issued a policy statement "to clarify the respective roles of FRA and OSHA in assuring the occupational safety and health of railroad employee[s]." Policy Statement, 43 Fed. Reg. 10,583, 10,585 (1978). Relying on its special expertise in balancing the safety concerns of employees with the safety concerns of rail passengers, the FRA unequivocally asserted its authority to preempt OSHA regulation of rail industry occupational noise:

> FRA views the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over

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[3] Noise levels are stated in "decibels" (commonly denoted by "dB" or "dBA"), a measure of sound pressure.

[4] Congress actually delegated this FRSA authority to the Secretary of Transportation, 45 U.S.C. § 431(a), but the Secretary has delegated his responsibilities to the Administrator of the FRA. 49 CFR § 1.49(m) (1990).

[5] "The purpose of the [FRSA] was to provide comprehensive and uniform safety regulations in all areas of railroad operations." *Chicago Transit Auth. v. Flohr*, 570 F.2d 1305, 1308 (7th Cir. 1977).

[6] One such study concluded "that there does not appear to be a widespread problem of overexposure to noise based on the same type of evaluation as currently used by OSHA (only 1 out of 18 test runs exceeded the criteria)." Roger D. Kilmer, *Assessment of Locomotive Crew In-Cab Occupational Noise Exposure*, DOT Report No. FRA/ORD-80/91 (Dec. 1980).

> which the FRA has exercised its statutory jurisdiction. FRA is therefore responsible for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in the light of overall safety considerations.

43 Fed. Reg. at 10,588.

In 1980, the FRA followed up its 1978 assertion of exclusive regulatory authority with a clear exercise of that authority by promulgating its "Locomotive cab noise" regulations, *see* Railroad Locomotive Safety Standards and Locomotive Inspection, 45 Fed. Reg. 21,092 (1980), 49 CFR § 229.121 (1990), which generally follow the OSHA format but are specifically tailored to the railroad industry.[7]

The OSHA and FRA regulatory schemes remained substantially similar until 1981, when OSHA amended its regulations to add "hearing conservation" standards, which require auditory testing and hearing protection devices for employees whose 8-hour time-weighted noise exposure exceeds 85 dB. The FRA did not reflexively follow suit. As the FRA has long recognized, the propriety of requiring personal hearing conservation protection in locomotive cabs raises unique concerns, including "the need to preserve the alertness of employees to rail transportation hazards affecting the employees, passengers, and the general public along the right-of-way." 43 Fed. Reg. at 10,588. To date, the FRA has not amended its locomotive cab noise regulations to include hearing conservation measures. (It did recently revisit those regulations; it found no "valid basis" for altering them. *See* Quali-

[7] The primary difference between the 1973 OSHA standard and the 1981 FRA standard are the maximum exposure periods—the OSHA regulation is based on the standard 8-hour shift and the FRA regulation is based on the 12-hour shift common in the rail industry. The 8-hour time-weighted permissible average of 90 dB is the same under both regulations.

fications for Locomotive Engineers, 56 Fed. Reg. 28,228, 28,236 (1991).)

Despite the existence of two potentially inconsistent sets of occupational noise standards, dual regulation has presented few problems until now, since the agencies themselves apparently agree on the appropriate jurisdictional boundaries. The FRA claims exclusive authority to regulate rail employee noise exposure, a task to which it has devoted considerable energy. It has reaffirmed the breadth of its statutory jurisdiction over railroad safety on numerous occasions. *See, e.g.*, Bridge Worker Safety Rules, 56 Fed. Reg. 3434 (1991) ("OSHA lacks jurisdiction over safety issues relating directly to railroad operations—a subject over which FRA's authority is *exclusive*") (emphasis added). And, the Occupational Safety and Health Review Commission ("OSHRC"), the adjudicative body established by the OSH Act, *see* 29 U.S.C. §§ 659, 661, has ratified the FRA preemption of OSHA in the railroad safety forum. *See Consolidated Rail Corporation*, 1982 CCH OSHD ¶ 26,044 ("we believe that the [FRA's] policy statement satisfies the requirements of section 4(b)(1) of the Act."); *see also Mushroom Tranp. Co.*, 1973-1974 CCH OSHD ¶ 16,881 (once another federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions).

C. Proceedings in the Lower Courts

The section 4(b)(1) preemption issue arises here in a suit brought under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, which creates a federal cause of action for railroad employees killed or injured due to the negligence of a railroad. Some courts have held that an employer's violation of an applicable safety regulation (including OSHA safety regulations) establishes negligence per se in a FELA case. *See, e.g.*, *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 264 (1st Cir. 1985). Other courts have held that applicable OSHA regulations provide evidence of the standard of

care imposed on employers. *See, e.g., Albrecht v. Baltimore & Ohio R. Co.*, 808 F.2d 329, 332 (4th Cir. 1987). In addition, FELA eliminates the defense of contributory negligence where violation of an applicable safety satute contributed to the injury or death, 45 U.S.C. § 53, and courts have held that this provision encompasses applicable OSHA regulations, *see, e.g., Pratico*, 783 F.2d at 267. Thus, determining which safety regulations set the standard of care to which a railroad will be held is a key issue in FELA cases.

The plaintiff Bruce Wallace, a Southern locomotive fireman and engineer from 1956 to 1989, brought this FELA suit in the Circuit Court of the City of Norfolk, Virginia, alleging that Southern was negligent in exposing him to excessive noise levels and in not providing a "hearing conservation" program that complies with OSHA noise exposure regulations. Southern contended before, during and after trial that its post-1981 conduct could not be judged against the OSHA standard, since the FRA, the "dominant" agency with respect to railway safety issues, had promulgated locomotive cab noise regulations which differ in material respects from the generic OSHA noise regulations—an action that Southern contended clearly satisfies the section 4(b)(1) preemption test.

Despite repeated and vigorous objections by Southern, *see, e.g.*, App. 10a-13a, the trial court allowed the plaintiff to introduce the OSHA noise exposure regulations (including OSHA's hearing conservation requirements), upon which the plaintiff relied heavily on the issues of duty and standard of care. In addition (and also over Southern's objection, *see* App. 16a), the trial court specifically instructed the jury that it could consider noncompliance with OSHA regulations as evidence of negligence, *see* App. 14a-16a. On September 5, 1990, the jury returned a verdict in favor of the plaintiff in the amount of $350,000. *See* App. 1a. Southern moved to have the verdict set aside, citing, *inter alia*, the court's errors in admitting the OSHA regulations and in instructing the jury to consider noncompliance with those regulations as evi-

dence of negligence. *See* App. 5a-7a On September 17, 1990, the Circuit Court judge entered judgment on the jury verdict in favor of the plaintiff. App. 1a-2a.

Under applicable Virginia law, Southern's only appellate option was to petition the Supreme Court of Virginia for discretionary review. It did so, and that court denied Southern's petition for appeal in a one sentence order stating that "there is no reversible error in the judgment complained of." App. 8a. Southern then filed a petition for rehearing, which was also denied without opinion. App. 9a.

REASONS FOR GRANTING THE PETITION

The decision of the Norfolk Circuit Court has the remarkable effect of punishing Southern for failing to comply with regulations that do not apply to it. Such retroactive standard-setting is plain error that should be corrected. More importantly, the decision widens the split among the lower courts on an important body of uniquely federal law—the appropriate jurisdictional boundaries of the myriad federal agencies that regulate workplace safety. Finally, because FELA and state jurisdiction and venue provisions encourage forum shopping, the Virginia decision promises to have a substantial nationwide impact, completely inconsistent with congressional intent, on the enormous mass of pending and future FELA litigation. Because this case squarely presents a conflict among the courts (both federal and state) on a recurring and important issue of federal law, the Court should grant this petition.

1. The Norfolk Circuit Court erred on an important question of federal law. OSHA's generic noise exposure standards do not apply to railroad locomotive cab noise. No other conclusion can be drawn from a reasoned analysis of the preemption mechanism established by Congress in section 4(b)(1) of the OSH Act. The FRA has plainly "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting" locomotive cab noise, *see* 29 U.S.C. § 653(b)(1), and OSHA's authority is there-

fore at an end with respect to those "working conditions," *id. See Velasquez*, 734 F.2d 216. The FRA has determined that the unique concerns of the rail industry, including the safety of rail pasengers, demand specifically tailored noise exposure regulations that differ from the generic provisions established by OSHA. This is precisely the type of reasoned agency conduct that section 4(b)(1) was designed to promote.

The Norfolk Circuit Court's decision that OSHA noise exposure standards (and in particular OSHA's hearing conservation requirements) are relevant in a locomotive cab noise case, and indeed, that Southern's failure to comply with those standards was evidence of negligence, clearly holds Southern to a different standard of care than that provided by proper application of section 4(b)(1).[8] The state court's rulings thus constitute plain error that should be corrected.

The federal question raised by this petition is of unusual importance for two reasons. First, the broad federal rulemaking effectively undertaken by the Virginia state court ignores important public safety concerns. The

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[8] In his Brief in Opposition to Southern's Petition for Appeal, the plaintiff argued that because Southern has of its own accord taken certain measures to reduce in-cab noise, it has somehow conceded the applicability of the OSHA standard. This argument is obviously without merit. FRA preemption of OSHA safety standards is a matter of federal law determined solely by congressional intent and the FRA's exercise of its statutory authority.

Plaintiff also asserted that any error was "harmless" because the jury might have relied on other evidence of negligence. The record demonstrates otherwise; plaintiff relied heavily and repeatedly on the OSHA hearing conservation standards in making his case on duty and standard of care. As the Fifth Circuit recently held in a similar case of FRA preemption of OSHA standards with a jury instruction nearly identical to the one challenged here: "The jury instruction incorrectly held the railroad to a specific government agency standard of care. This error creates 'a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.'" *Velasquez*, 734 F.2d at 219, *quoting Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981).

FRA's decisions not to adopt rules identical to those of OSHA in numerous areas, including noise exposure, reflect the FRA's expert balancing of the sometimes conflicting goals of employee safety and passenger and bystander safety. Although Congress plainly intended the FRA's regulations to govern railroad safety practices, the threat of FELA litigation may nonetheless force railroads to adopt every feature of OSHA's employee safety regulations that does not directly conflict with an FRA regulation, regardless of the impact on public safety.

Second, by failing to sustain Southern's section 4(b)(1) preemption claim, the Virginia court has created a conflict between two federal agencies where none previously existed. More importantly, it has muddied the section 4(b)(1) waters with respect to all federal agencies that exercise workplace safety regulatory authority. The location of the jurisdictional boundaries of these various federal agencies is a uniquely federal question that demands a coherent federal answer. Much is at stake as many of the nation's largest industries, including railroads, airlines, pipelines, mine operators, and marine shippers occupy the "grey areas" of potential overlap and conflict. Fifteen years of time-consuming and expensive litigation have failed to produce a clear answer from the lower federal and state courts, and the time has come for this Court to interpret definitively section 4(b)(1) of the OSH Act and provide employers and employees of these and other industries with the tools they need to determine which safety regulations will govern their relationships.

2. As described, *supra*, there is an *existing* circuit split on the proper interpretation of section 4(b)(1) of the OSH Act, and the Norfolk Circuit Court has added yet another branch to an already confused body of law. The federal circuits disagree on both (1) what action the "dominant" federal agency must take to effect preemption of generic OSHA regulations, and (2) the scope

of preemption, that is, the scope of the "working conditions" which the dominant agency carves out of OSHA's jurisdiction by the exercise of its separate regulatory authority.

Resolution of the first disputed issue turns on interpretation of the term "exercise" in section 4(b)(1), and there is profound disagreement among the federal circuits over what agency action amounts to an "exercise" of statutory authority. The Fifth Circuit reasonably concluded that "an assertion of authority in a policy statement is sufficient to displace OSHA regulations." *Velasquez*, 734 F.2d at 218.[9] The First, Second, Third, Fourth, and D.C. Circuits disagree, holding that the "preempting agency must actually promulgate regulations, mere declaration of authority over the area is not enough." *Columbia Gas*, 636 F.2d at 916 n.7; *see also Pratico*, 783 F.2d at 262; *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 777-78 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *Southern Railway v. OSHRC*, 539 F.2d 335 (4th Cir. 1976); *Baltimore & O.R.R. v. OSHRC*, 548 F.2d 1052 (D.C. Cir. 1976).

On the second issue, the range of opinions is even wider. Some railroads have taken the position in prior cases that Congress' command that the FRA prescribe standards "for all areas of railroad safety," 45 U.S.C. § 431(a), preempts application of all OSHA safety standards in the rail industry. The Secretary of Labor and the OSHRC, by contrast, have argued that the dominant agency's regulations must deal in the same way with the

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[9] *See also Usery*, 539 F.2d at 392 ("as the dominant agency in its limited area, the FRA can displace OSHA regulations by articulating a formal position that a given working condition should go unregulated or that certain regulations—and no others—should apply to a defined subject"); *Templeton v. Chicago & N.W. Transp. Co.*, 570 N.E.2d 467, 471 (Ill. App. 1991).

same "discrete hazard" in the same "working environment" to work a preemption. Under the latter approach, the FRA locomotive cab noise regulations would not preempt OSHA's generic noise regulations, because the FRA has not specifically mandated hearing conservation measures (such as hearing protection devices).[10]

The federal Circuit Courts have rejected both of these interpretations, and have come up with two distinct approaches of their own.[11] Some circuits define section 4(b)(1)'s "working conditions" as "discrete working environments" (e.g., a locomotive cab), while others restrict that term to "discrete hazards" within a given working environment (e.g., occupational noise exposure in a locomotive cab). The Third and Fourth Circuits have adopted the broader "discrete environment" approach, *see U.S. Air v. OSHRC*, 689 F.2d 1191 (4th Cir. 1982); *Southern Railway*, 539 F.2d at 339 ("We think this aggregate of 'surroundings' and 'hazards' contemplates an area broader in its contours than the 'particular, discrete hazards' advanced by the Secretary"); *Columbia Gas*, 636 F.2d at 916, while the First and Fifth Circuits favor the narrower "discrete hazard" approach, *see Usery*, 539 F.2d at 391 ("FRA regulation of portable fire extinguishers will not displace OSHA standards on fire alarm

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[10] This latter approach has been characterized as the "nook and cranny theory of safety regulation," under which OSHA's jurisdiction would extend into every minute detail of the working environment not covered by a specific standard or regulation of the other federal agency. *See Southern Railway*, 539 F.2d at 338. Obviously "[i]f this had been the intention of Congress, there would have been no point in including in the Act an exemption section." *U.S. Air v. OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982).

[11] The courts that have addressed the scope of preemption all begin with this Court's definition of "working conditions" in the Equal Pay Act context as "surroundings" and "physical hazards" "regularly encountered" by workers. *See Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

signaling systems."); *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 896 (1st iCr. 1981).

The decision of the Norfolk Circuit Court conflicts with *both* of these lines of federal circuit court cases. The FRA regulations at issue here are clearly addressed at the "discrete working environment" (i.e., locomotive cabs) to which Southern argues the OSHA noise regulations do not apply, and the Norfolk Circuit Court's decision is thus inconsistent with the Fourth Circuit approach. Moreover, the FRA regulations are directed at a discrete hazard within that environment (i.e., noise) and are also inconsistent with the Fifth Circuit approach. The Norfolk Circuit Court has, in effect, adopted the "nook and cranny" approach flatly rejected by the federal courts —that the OSHA noise regulations are not preempted simply because they are *different* than the competing FRA regulations.

Given the existence of a lower court split and the unquestionable importance of the federal law issues presented, the principal question here is whether this case presents a suitable vehicle for definitively interpreting section 4(b)(1). This case presents an ideal vehicle for resolving the (now) three-way split among the lower courts that have concurrent jurisdiction over FELA claims on the proper scope of section 4(b)(1) preemption. The OSHA hearing conservation measures relied upon by the plaintiff in this case have no direct counterpart in the competing FRA regulations, and the scope issue is thus squarely presented. It is also central to the outcome of the case; if OSHA noise regulations do not apply to locomotive cabs, a railroad's failure to comply with them can hardly be deemed evidence of negligence. Moreover, by granting the petition the Court can prevent any widening of the lower court split on what action consummates preemption. The FRA has both articulated a formal statement that it alone has authority to regulate locomotive cab noise exposure and enacted regu-

lations pursuant to its asserted authority. Thus, whatever the appropriate point of preemption on the dominant agency action continuum, some preemption has occurred here, and the Norfolk Circuit Court's judgment to the contrary rests on an erroneous legal conclusion that should not be allowed to stand.[12]

The Virginia courts' failure to issue written opinions in this case should provide no basis for denying review. The existence of written conflicting opinions by the First, Second, Third, Fourth, Fifth and D.C. Circuits ensures that the lack of an opinion in this case will not hinder this Court's deliberations. Moreover, this Court has in the past granted certiorari to review orders issued without opinion on numerous occasions when the significance of the issues raised and the procedural posture of the case warranted this Court's review.[13] These factors clearly support a grant of this petition. Virginia is one of only two states that provides no appeal of right from adverse trial court decisions, and the Virginia Supreme Court denied discretionary review here without explanation.[14]

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[12] As discussed in detail, at pp. 16-17, *infra*, state and federal courts have concurrent jurisdiction over FELA claims, and the FELA jurisdictional scheme encourages forum shopping. The availability of a state forum amenable to OSHA-based FELA claims thus makes it highly unlikely that this Court will be presented with a suitable federal circuit court decision for review of the important section 4(b)(1) issues raised in this petition.

[13] *See, e.g., Mallard v. United States District Court*, 490 U.S. 296 (1989); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988); *Taylor v. McKeithen*, 407 U.S. 191 (1972); *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 147 (1975); *Will v. United States*, 389 U.S. 90, 94 (1967); *Lytle v. Household Mfg., Inc.*, 492 U.S. 917 (1989); *Carden v. Arkoma Assoc.*, 490 U.S. 1045 (1989).

[14] Denial of appeal by the Virginia Supreme Court does not give the Norfolk Circuit Court's decision the precedential effect of a Virginia Supreme Court merits decision. *See, e.g., Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750, 755 n.2 (Va. 1984). However, the practical precedential effect of the Circuit Court's decision

Thus, the Norfolk Circuit Court's misapplication of federal law has to date been completely insulated from appellate review.[15] It would be highly inappropriate to allow important issues such as the one raised in this case to escape review by this Court simply because the Virginia courts do not see fit to state the reasons behind their decisions.

3. An independent ground for granting this petition is the potential for forum shopping in the wake of the state court decisions below—a concern which is fueled by the fact that the decisions below were rendered in the context of FELA litigation. A FELA claim can be brought in any jurisdiction in which a railroad company does business, and a single lower court misinterpretation of section 4(b)(1) is quickly magnified in importance as that jurisdiction becomes a mecca for similar FELA claims. Thus, the Norfolk Circuit Court currently sits as the self-appointed dean of workplace safety jurisdictional boundaries between two federal agencies, the FRA and OSHA. It has ignored congressional and agency intent in drawing that boundary and only this Court can correct the error.

To understand the enormous impact that this single aberrant state court ruling will have on the entire federal workplace safety regulatory scheme, it is necessary to review briefly the FELA jurisdiction provision, Virginia state law on jurisdiction and venue, and federal removal provisions. The jurisdiction of federal courts under FELA is "concurrent with that of the courts of the several States." 45 U.S.C. § 56. Moreover, the de-

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is greatly magnified due to the liberal Virginia and FELA venue and jurisdictional provisions discussed in detail at pp. 16-17, *infra*.

[15] *Cf.* Graham C. Lilly and Antonin Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 Va. L. Rev. 3, 16 (1971) (noting that if "one feels that no man's property or liberty should be disposed of by the unappealable determination of a single individual," the appellate process in Virginia faces a crisis).

fendant may not remove a FELA claim brought in state court to a federal district court. 28 U.S.C. § 1445. Thus, subject only to state jurisdiction and venue constraints, plaintiffs have near absolute discretion with respect to forum in FELA cases.

The Commonwealth of Virginia welcomes FELA plaintiffs. Virginia courts may exercise personal jurisdiction over any person "transacting any business" in the Commonwealth of Virginia. Va. Code Ann. § 8.01-328.1; *see also Industrial Carbon Corp. v. Equity Auto & Equip. Leasing Corp.*, 737 F. Supp. 925, 927 (W.D. Va. 1990), *dismd. without op.* 922 F.2d 835 (4th Cir. 1991) (the only real limitation on the exercise of personal jurisdiction under the "transacting business" provision is the Due Process Clause of the Fourteenth Amendment). And, venue is proper in any county or city where, *inter alia*, the defendant "regularly or systematically conducts affairs or business activity." Va. Code Ann. § 8.01-262. Two of the Nation's largest railroad systems, CSX Transportation and the Norfolk Southern railroads [16] do business throughout Virginia. The potential for destructive forum shopping in the wake of the decisions of the Virginia state courts in this case—which, in effect, wrote section 4(b)(1) out of the OSH Act and thus effectively mandated the dual regulation that Congress sought to avoid—is thus obvious.

The stakes are enormous. Railroad FELA litigation has reached epidemic status in recent years. Nationwide there are more than 28,000 FELA hearing loss claims and suits against the Nation's railroads.[17] CSX Trans-

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[16] Norfolk and Western Railway Company and Southern Railway Company (recently renamed Norfolk Southern Railway Company) are wholly-owned subsidiaries of Norfolk Southern Corporation, a Virginia corporation.

[17] Association of American Railroads, *1990 Report of Claim & Litigation Experience* at 4-5 (*"AAR 1990 Report"*). FELA claims represent a staggering drain on the railroad industry. Although

portation and the Norfolk Southern railroads are defendants in more than 3,400 FELA suits, of which over 2,100 involve hearing loss claims. Any injured employee of these railroads (and any other railroad that "transacts business" in Virginia), regardless of his residence or the place of occurrence of the accident, may now take advantage of the Norfolk Circuit Court's erroneous finding that OSHA noise standards are relevant in the locomotive cab environment. Thus, while OSHA and the FRA agree that OSHA noise exposure regulations do not apply to locomotive cab employees—the only position consistent with Congress' section 4(b)(1) mandate—in the real world where dollars change hands and primary behavior is shaped, those preempted OSHA regulations apply with full force (notwithstanding the lack of a published opinion in this case).[18]

---

railroad employment declined by more than 40 percent and reported railroad employee injuries fell by more than half during the 1980s, total FELA payouts by rail carriers *more than doubled* from $398 million in 1981 to $811 million in 1988. *See Federal Employers' Liability Act: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (prepared statement of William H. Dempsey, President of the Association of American Railroads) at 6. By 1990, the total FELA payout had increased to $877 million (of which hearing loss cases accounted for $103.6 million). *AAR 1990 Report* at 1-5. In 1990 alone, over 55,000 FELA claims were reported (of which 27,095 were hearing loss claims), and plaintiffs filed over 7,900 FELA lawsuits (3,470 of which were hearing loss lawsuits). *Id.* at 1-5, 4-5.

[18] Such broad federal rulemaking by a lower state court is particularly troubling where, as here, there are other safety concerns at stake. Thus despite the FRA's implicit decision that employee alertness and public safety concerns, see pp. 6-7, *supra*, outweigh any benefits to be derived from hearing conservation measures, railroads amenable to suit in Virginia will adopt hearing conservation measures (or pay FELA dollars for the privilege of complying with the FRA standard).

Southern's concern is more than idle speculation. Norfolk and neighboring Portsmouth have been aptly characterized as "happy hunting ground[s]" for FELA plaintiffs:

> [a]ttorneys representing railroad employees claiming job-related injuries occurring all over the continental United States apparently think it worthwhile to bring actions against railroads in Portsmouth, or in neighboring Norfolk, rather than in the localities in which the accident occurred.

Caldwell v. Seaboard System R.R., Inc., 380 S.E.2d 910, 915 (Va. 1989) (Russell, J., dissenting), *cert. denied*, —— U.S. —— (1990). In fact, more than a dozen hearing loss suits are presently pending in Norfolk Circuit Court against Southern alone.[19] The Court can put an end to this destructive forum shopping by granting this petition and fixing the proper interpretation of section 4(b)(1).

In summary, this case presents an important question of federal law which has not been, but should be, settled by the Court. The Court should grant this petition to resolve the conflict in the lower courts regarding section 4(b)(1) of the OSH Act and provide employers, employees, and lower courts with proper guidance as to the jurisdictional boundaries of the various federal agencies that regulate workplace safety.

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[19] Nor are the forum shopping problems evidenced by the concentration of FELA cases in Norfolk an isolated event. In *Gardner v. Norfolk & Western Ry.*, 372 S.E.2d 786 (W.Va. 1988), *cert. denied*, 489 U.S. 1016 (1989); the West Virginia Supreme Court held that the doctrine of forum non conveniens did not apply to cases brought under FELA. In the following two years, 818 FELA cases were filed in the Circuit Court of Brooke County, West Virginia, 644 of which involved plaintiffs who did not reside in West Virginia. *See Norfolk and Westren Ry. v. Tsapis*, 400 S.E.2d 239, 241 (W.Va. 1990). Citing "the changing needs of our society" the West Virginia Supreme Court recently overruled *Gardner. Tsapis*, 400 S.E.2d at 243-44.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 5, 1991

APPENDIX

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK
ON THE 5th DAY OF SEPTEMBER, 1990

At Law #L88-973

BRUCE L. WALLACE,

Plaintiff

vs.

SOUTHERN RAILWAY COMPANY,

Defendant

ORDER

This day came again the plaintiff, BRUCE L. WALLACE, in person and by counsel and again came the defendant, SOUTHERN RAILWAY COMPANY, by representative and by counsel, and came as well the same jury heretofore impanelled and sworn pursuant to adjournment on the 4th day of September, 1990.

Thereupon the Court and the jury reconvened and heard closing arguments. The jury received the instructions from the Court and Catherine Poyner (the alternate) was discharged from further jury service. Then, the jury retired to the jury room to consider their verdict. And after some time, the jury returned into open Court with a verdict in the following words: "We, the jury, on the issues joined find in favor of the plaintiff and assess his damages at $350,000.00. /s/ George Buchan, Jr, Foreperson."

Whereupon, the defendant, by counsel, moved the Court to poll the jurors as to their said verdict, to which poll the jurors replied that the verdict herein recorded was his or her verdict.

Then, the defendant, by counsel, renewed all of his previous motions and also moved the Court to set aside the verdict as contrary to the law and the evidence and to enter summary judgment or in the alternative, grant a new trial, which motions were overruled and to which ruling of the Court, counsel for the defendant excepts.

Therupon, the Court discharged the jurors from further consideration of this case.

Whereupon it is considered, adjudged and ORDERED by the Court that the plaintiff, BRUCE L. WALLACE, recover of and have judgment against the said defendant, SOUTHERN RAILWAY COMPANY, in the sum of THREE HUNDRED FIFTY THOUSAND DOLLARS AND NO CENTS ($350,000.00) with interest at the legal rate of percentum per annum from the 6th day of September, 1990 until paid, together with the costs of his suit herein expended, and this matter is ENDED and REMOVED from the docket of this Court.

ENTERED: 9/17/90

/s/ Jerome James
JEROME JAMES
Judge

(clerk/vrb)
ord.6rr

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK
ON THE 4TH DAY OF SEPTEMBER, 1990

At Law #L88-973

BRUCE L. WALLACE,

Plaintiff

vs.

SOUTHERN RAILWAY COMPANY,

Defendant

ORDER

This day came again the plaintiff, BRUCE L. WALLACE, in person and by counsel, and came again the defendant, SOUTHERN RAILWAY COMPANY, by representative and by counsel, and came as well the same jury heretofore impanelled and sworn pursuant to adjournment on the 31st day of August, 1990.

Since the trial of this case will not be concluded within the August term of this Court, the Court, pursuant to Section 17-26 of the Code of Virginia (1950), as amended, ORDERED the trial of this case to continue until it is concluded and this case disposed of.

It is further ORDERED that the jurors previously drawn and selected shall continue to serve as jurors in this case until the trial is concluded, to-wit: Berly Barge, George Buchan, Charles Copeland, Vivian Harvey, Mary Holley, Laurel Landry and Chandra Page, and one alternate, Catherine Poyner.

And the Court and the jury resumed hearing the evidence presented on behalf of the defendant. At the conclusion thereof, the defendant rested.

By agreement of counsel, the defendant's defense of contributory negligence is withdrawn.

The plaintiff, by counsel, moved to strike the evidence of the defendant on grounds stated in the record, which motion was overruled and to which ruling of the Court counsel for the plaintiff excepted.

Then, the defendant, by counsel, renewed his motion to strike the plaintiff's evidence, on the same grounds, which motion was overruled and to which ruling of the Court counsel for the defendant excepted.

And the Court adjourned, and the jury was allowed to depart at 2:20 p.m., pursuant to the adjournment order, however, the Court and the parties continued to review the jury instructions until 7:00 p.m. and will reconvene on the 5th day of September, 1990 at 10:30 a.m.

ENTERED: 9/17/90

/s/ Jerome James
JEROME JAMES
Judge

(clerk/vrb)
ord.5rr

[1176] VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

At Law No. L88-973

BRUCE L. WALLACE,

Plaintiff,

v.

SOUTHERN RAILWAY COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

September 5, 1990

Volume VI

Before: Honorable Jerome James, Judge, and a Jury

APPEARANCES:

SAMS, DONATO, SPIER & HASTINGS
By: BRIAN J. DONATO, ESQUIRE
HOWARD A. SPIER, ESQUIRE
and

WHITE, JOHNSON & LAWRENCE
By: WILLIAM S. SANDS, JR., ESQUIRE
Counsel for the Plaintiff

WILLIAMS, WORRELL, KELLY, GREER
& FRANK
By: SAMUEL J. WEBSTER, ESQUIRE
DANIEL R. WARMAN, ESQUIRE
Counsel for the Defendant

* * * *

[1304] MR. WEBSTER: We would move to set aside the verdict as contrary to the law and the evidence, and included with that would be the moving to set it aside because of the errors in the granting of jury instructions and to set it aside because on the bases of the motions to strike that we had made, and basically that is that the instructions dealing with FRA and the instructions dealing with OSHA were improperly granted and improperly included in this case and as we argued to Your Honor and moved early on in the case the FRA—the OSHA evidence shouldn't have even come in because it's preempted by FRA, and moreover there should be separate cause of action for FRA, and FRA shouldn't have been put in the instructions the way it was. And I've already objected to those specific instructions, but I want to renew those motions.

[1305] And we also want to move for a new trial to set aside the verdict and move for a new trial on the basis of our objections to evidence that has been admitted and that's already been ruled on by the Court.

Also, I would move to set aside on the basis that it was error for the Court to allow the jury to consider future earnings for the reasons previously stated, primarily based upon Mr. Wallace's own testimony.

THE COURT: Anything else?

MR. WEBSTER: That's all, Your Honor. Thank you.

THE COURT: All right.

MR. DONATO: Very briefly, Your Honor. We believe that the Court properly reviewed the evidence, properly ruled on the testimony, properly instructed the jury, properly included instructions on the OSHA as guidance for the jury, the FRA, if applicable, if it was violated, properly instructed the jury otherwise on the FELA related law.

In no way do we agree with the defense counsel there should be grounds for a mistrial in this case or a new trial or a directed verdict. This jury took in excess of five hours to decide this case. It is well and truly tried.

I think if there were any errors that were attempted to be injected into the case they were more [1306] than cured by the rulings of the Court, and in short, Judge, we would ask you to deny all motions and sustain the verdict and enter it by your judgment in this case.

THE COURT: All right. Mr. Webster?

MR. WEBSTER: Yes, sir. Your Honor, I don't know that there's anything else I can add to the arguments that have been advanced to this court since August 27th.

THE COURT: All right. All of your motions are respectfully overruled. I'll note your exception to each ruling of the Court. And the verdict of the jury will be entered.

* * * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 27th day of February, 1991.

Record No. 901683

Circuit Court No. L88-973/L2295-90

SOUTHERN RAILWAY COMPANY,
Appellant,

against

BRUCE L. WALLACE,
Appellee.

From the Circuit Court of the City of Norfolk

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:
DAVID B. BEACH
Clerk

By: /s/ [Illegible]
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of June, 1991.

Record No. 901683

Circuit Court No. L88-973/L2295-90

SOUTHERN RAILWAY COMPANY,
Appellant,

against

BRUCE L. WALLACE,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 27th day of February, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

[1] VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

At Law No.: L88-973

BRUCE L. WALLACE
Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Date: August 27, 1990

Before: THE HONORABLE JEROME JAMES

Appearances:

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BY: DANIEL R. WARMAN, ESQUIRE &
SAMUEL J. WEBSTER, ESQUIRE
Of Counsel.

* * * *

[24] MR. WARMAN: I'd like Your Honor to rule on the record, then what you're going to say that they can introduce. Evidence of OSHA standards after August 31, 1981 which include a hearing conservation program? I have to ask that Your Honor put that on the record so that we'll have this point on appeal.

THE COURT: Okay. All right. That's on the record.

* * * *

[25] MR. WEBSTER: Judge, just to clarify your ruling, your ruling of evidence of the OSHA standards subsequent to August 31, 1980 will be admissible in this case?

THE COURT: That's correct.

MR. WEBSTER: All right. Then we'd obviously like to note our objection and exception to that ruling for the reasons already stated in argument.

The COURT: All right.

* * * *

[951] VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

At Law No. L88-973

BRUCE L. WALLACE,
Plaintiff,

v.

SOUTHERN RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

September 4, 1990

Volume V

Before: HONORABLE JEROME JAMES, Judge, and a Jury

Appearances:

SAMS, DONATO, SPIER & HASTINGS
By: BRIAN J. DONATO, ESQUIRE
HOWARD A. SPIER, ESQUIRE
and
WHITE, JOHNSON & LAWRENCE
By: WILLIAM S. SANDS, JR., ESQUIRE
Counsel for the Plaintiff

WILLIAMS, WORRELL, KELLY, GREER & FRANK
By: SAMUEL J. WEBSTER, ESQUIRE
DANIEL R. WARMAN, ESQUIRE
Counsel for the Defendant

* * * *

[1075] MR. WEBSTER: Your Honor, as I understand the Court's earlier rulings, the Court has ruled that OSHA is admissible in this case as evidence, factual evidence, of negligence but it is not the law in this case, and I would respectfully renew our objection to that earlier ruling, and I think that the propagation of this instruction by the Plaintiff points up, in our view, the problems with that ruling.

This instruction is supposed to be an instruction of law by the Court, and OSHA is nothing but factual evidence in this case. This instruction would emphasize that factual evidence to the exclusion of all other, and notwithstanding that the instruction says it's evidence, it smacks of a finding instruction, and I think it's improper to emphasize evidence to give the imprimatur of law to a ruling that the Court has said OSHA is evidence of negligence and to comment on the evidence by instructions, and we would respectfully object, first, to the Court's earlier ruling about FRA not preempting OSHA in the area of noise exposures in the engine cabs but more [1076] strenuously object to the giving of that instruction on that basis as well as what I've just noted here. It's commenting on the evidence. It emphasizes certain evidence to the exclusion of other evidence in this case, and that's not the purpose of jury instructions.

* * * *

[1176] VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

At Law No. L88-973

BRUCE L. WALLACE,
Plaintiff,

v.

SOUTHERN RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

September 5, 1990

Volume VI

Before: Honorable Jerome James, Judge, and a Jury

Appearances:

SAMS, DONATO, SPIER & HASTINGS
By: BRIAN J. DONATO, ESQUIRE
HOWARD A. SPIER, ESQUIRE
and
WHITE, JOHNSON & LAWRENCE
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Counsel for the Plaintiff

WILLIAMS, WORRELL, KELLY, GREER & FRANK
By: SAMUEL J. WEBSTER, ESQUIRE
DANIEL R. WARMAN, ESQUIRE
Counsel for the Defendant

* * * *

[1206] [THE COURT:] The Court instructs the jury that you may consider as evidence in this case the Occupational Safety and Health Act, in parentheses OSHA, provisions of 29 Code of Federal Regulations Section 1910.95 *et seq.* which provides as follows:

In parentheses, (a), Protection against the effects of noise exposure shall be provided when the sound level exceeds those shown in table G-16;.

B) (1) When employees are subjected to sound exceeding those listed in table G-16, feasible administrative or engineering controls shall be utilized. If such controls failed to reduce sound levels within the level of table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Table G-16, referred to above, sets forth the permissible noise exposure within the workplace over a period of an eight-hour day.

[1207] You will find in this instruction—and I don't see the need to—you have two columns. One, it says duration per day in hours. The column to the immediate right of that says sound levels and dBA, which would be—I don't see where I need to list all of those, but I will give you one duration per day, and hours is eight. Sound level, dBA, is 90. And then it goes down from eight to six to four to three to two, one and a half, one, one half, and the sound level goes from 90 down to 115 dBA.

Now, according to Section 1910.95(c) of the OSHA regulation enacted in March 1984, the employer shall administer a continuing, effective hearing conservation program. Whenever employee knows exposure, noise exposures, equal or exceed an eight-hour time weighted average sound level of 85 decibels.

The foregoing regulations could be considered by you merely as one more piece of evidence on the issue of negligence. The regulations are not conclusive or binding on you and the application of the regulations to the facts of the case are solely for your determination as is

the weight to be given to the regulations in determining the issue of negligence.

If you find from the greater weight of the evidence that the above OSHA regulations have been [1208] violated with respect to the noise levels inside the locomotive engine to which Plaintiff Wallace was assigned at the times and places in question, you might consider such violations as evidence of negligence.

* * * *

[1294] [MR. WEBSTER:] Defendant objects to instruction 17 on the ground that any reference to OSHA regulations was improper [1295] on the ground that FRA preempts OSHA in the area of noise exposure, the locomotive cab to an engineer.

* * * *

(2)

No. 91-406

FILED
OCT 21 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BRUCE L. WALLACE,
Respondent.

On Petition for a Writ of Certiorari to The Circuit Court of the City of Norfolk, Virginia

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in a Federal Employers' Liability Act case, a lower court's instruction indicating that OSHA noise abatement regulation is evidence of negligence, constitutes harmless error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-406

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BRUCE L. WALLACE,
Respondent.

On Petition for a Writ of Certiorari to
The Circuit Court of the City of Norfolk, Virginia

BRIEF FOR THE RESPONDENT IN OPPOSITION

This case is about Southern Railway's ("Southern's") negligence regarding the health and safety of one of its employees, and the attempt of said railroad to absolve itself of liability by asserting compliance with noise exposure regulations that establish minimum standards of care. The petitioner would have this Court believe that "This case turns on which of two federal noise exposure standards is applicable to raidroad locomotive cab employees." (Pet. at 4). To that end, the petition before this Court attempts to frame the decision below in terms of preemption, blurring the current status of federal case law on the issue in hopes of invoking the discretionary review of this Court.

ARGUMENT

I. OSHA'S NOISE REGULATIONS WERE ONE OF SEVERAL APPROPRIATE GUIDES TO THE JURY IN ITS DETERMINATION OF STANDARD OF CARE.

The issue before this Court concerns the evidentiary propriety of using an OSHA standard as "evidence" of negligence in a FELA case. There is substantial case law supporting the notion that a safety regulation, even where inapplicable as a sanction against a particular actor, may still be admissible in a court as evidence of responsibilities or duties incumbent upon that person by custom. *See, infra*, at 3-6. To this end, it has been held that the standard of care establishing negligence in FELA cases may be greater than the standards which the railroad is statutorily bound to follow. In *Henry v. District Court*, 645 P.2d 1350, 1352 (Mont. 1982), the court stated, "A railroad company is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules, the circumstances may require it to do more." See also *Seaboard Coast Line Railroad Co. v. Buchman*, 358 So.2d 836 (Fla. App. 1978).

In an attempt to divert the Court's attention from the true issue, the petitioner suggests that the key determination to be made in this case is whether the Federal Railroad Administration ("FRA") or the Occupational Safety and Health Act ("OSHA") noise regulations should control with respect to the respondent's injury. The petitioner states that,

> Some courts have held that an employer's violation of an applicable safety regulation (including OSHA safety regulations) establishes negligence per se in a FELA case. (citation omitted) Other courts have held that applicable OSHA regulations provide evidence of the standard of care imposed on employers. (citation omitted).

(Pet. at 7-8). The petitioner concludes that because FELA eliminates the defense of contributory negligence

where violation of an applicable safety statute contributed to the injury or death, the key issues to be determined is whether OSHA or FRA regulations apply in this case. The petitioner asserts throughout, that although the FRA provides the preempting regulations, the Norfolk Circuit Court erroneously overrode the FRA's preemptive effect by charging the jury that OSHA was relevant as evidence of negligence. The petitioner suggests that the instruction was tantamount to subjecting the petitioner to OSHA's independent regulatory force and its statutory remedies. (Pet. at 10). This is clearly not the case.[1] The petitioner's focus on determining the applicable safety statute is misplaced, as the case before the Norfolk Court was a negligence claim brought under FELA.

The history of the FELA clearly establishes the relevance of regulatory standards as evidence of custom, regardless of their direct application to the persons or incidents at issue. This Court stated in *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958) that,

> [I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it was clear that the general congressional intent was to provide liberal recovery for injured workers (citation omitted), and it is also *clear that Congress intended*

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[1] The record before the court supports the conclusion that the petitioner was subjected to FRA regulations, not OSHA regulations. The jury was charged to address two issues against the petitioner: (1) a claim of an FRA violation and (2) a claim of negligence. (App. at 2a). Additionally, the judge gave a negligence per se claim only with respect to the FRA violation. (App. at 3a). This argument will be developed more fully throughout the body of this brief. The record establishes that the parties were scrupulous about applying the FRA as the applicable regulatory standard under which the respondent's injury was sustained. (App. at 1a-3a).

> *the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers.* (emphasis added).

Id. at 432.

The Norfolk Circuit Court's use of the OSHA standards as relevant evidence of negligence by establishing an appropriate standard of care finds support in federal case law, with respect to claims of both negligence and negligence per se. *Albrecht v. Baltimore & Ohio Railroad Company*, 808 F.2d 329, 332 (4th Cir. 1987), supports the contention that statutory standards, regardless of their direct application to a particular class of persons, may be used as evidence of negligent conduct, even where questions of preemption potentially exist. *Albrecht* involved a FELA claim in which OSHA regulations were referred to in the jury instructions on the issue of negligence. The circuit court held that "the [OSHA] regulations could be considered by [the jury] merely as one more piece of evidence on the issue of negligence.' " The jury was instructed that:

> [T]he regulations could be considered by it merely as 'one more piece of evidence on the issue of negligence.' . . . [and that] the regulations were not conclusive or binding and that the application of the regulations to the facts of the case were solely for the jury to determine, as was the weight to be given to the regulations in determining the issue of negligence.

Id. In the case at bar, the instruction was equally clear as to the limited use to be made of the OSHA standards. The Norfolk court charged the jury that:

> The foregoing [OSHA] regulations could be considered by you merely as one more piece of evidence on the issue of negligence. The regulations are not conclusive or binding on you and the application of the regulations to the facts of the case are solely for your determination as is the weight to be given to

> the regulations in determining the issue of negligence. (Pet. App. 15a-16a).

The instruciton presented by the Norfolk Circuit Court mirrored that approved in the *Albrecht* case.[2]

Although the propriety of applying an otherwise inapplicable statute as evidence in a claim of negligence per se may be disputed, such evidence is clearly admissible when the claim is one of mere negligence. The case before this Court involves a claim of mere negligence and there-

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[2] The Petitioner alleges that the instruction of the Norfolk Circuit Court was "nearly identical" to an instruction in the Fifth Circuit which was deemed to establish reversible error (Pet. at 10, note 8). Reversible error in the Fifth Circuit was based not merely on a jury instruction, but on the fact that the court allowed into evidence expert testimony of the role of OSHA regulations in general, and testimony that the regulations applied to the railroad. *Velasquez v. Southern Pacific Transportation Co.*, 734 F.2d 216, 217 (5th Cir. 1984). The circuit court explained the harmful nature of the instruction in light of the expert testimony, and a jury instruction that "incorrectly held the railroad to a specific government agency standard of care." *Id.* at 219. The jury instruction in the present case, like the instruction in *Albrecht*, is distinguishable from *Velasquez*. The Norfolk court did not specifically apply the OSHA standard of care, but instructed only that the OSHA regulations *could be* considered, as *merely one more piece* of evidence, that the regulations were *not conclusive or binding*, and finally, that the application of the regulations to the facts was solely for the jury's determination, as was the weight to be given the regulations. (Pet. App. 15a-16a). Finally, the present case is distinguishable from *Velasquez* in that no expert witnesses were relied on to establish that OSHA directly applied to the petitioner subjecting him to its statutory remedies. The expert testimony in the present case clearly establishes that the "FRA is the active component of federal law" in this case. (App. at 1a). It should also be noted that at no time in his charge did the trial court judge instruct the jury that a finding of negligence would preclude a finding of contributory negligence. If the Norfolk court was, in fact, applying OSHA regulation to the petitioner, such an instruction would have been given to the jury, because FELA eliminates contributory negligence defense where violation of an *applicable* safety statute is the cause of injury or death. *See Pratico v. Portland Terminal Co.*, 783 F.2d 255, 267 (1st Cir. 1985).

fore evidence of an otherwise inapplicable statute is appropriate.

The case of *Barger v. Mayor & City Counsel of Baltimore*, 616 F.2d 730 (4th Cir. 1980), *cert. denied* 449 U.S. 843 (1980) involved a claim of negligence per se for hearing loss under the Jones Act. The Fourth Circuit upheld as harmless error an instruction that the city's failure to comply with OSHA noise regulations on its fireboats would render it guilty of negligence per se. Unlike *Barger*, the present case involves a jury instruction that merely suggested OSHA as providing "one more piece of evidence" on the issue of negligence, as opposed to providing the sole basis on which negligence could be found. Such an instruction, if erroneous at all, certainly constitutes harmles error in light of the determination of the *Barger* court. (*See, infra* at 7).

Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231 (5th Cir. 1982), involved an employee's suit against the manufacturer of a defective product which caused the plaintiff's injury. The court noted that admission of OSHA regulations by the district court was clearly appropriate, in spite of the fact that OSHA created no federal cause of action as "the regulations were introduced as evidence of negligence and not as a basis for an independent cause of action." *Id.* at 1238. The court also concluded that although OSHA created no private right of action, "violation of an OSHA regulation is evidence of negligence or, in appropriate circumstances, negligence per se." *Id.*

Pratico v. Portland Terminal Co., supra, considered whether the doctrine of negligence per se could be applied for violations of OSHA in FELA cases. The court concluded that violations of OSHA could indeed be evidence of negligence per se in FELA cases, and stated, contrary to petitioner's repeated assertions, that "Allowing OSHA regulations to act as 'guides for the determination of standards of care,' *National Marine Service, Inc.*

v. Gulf Oil Co., 433 F. Supp. 913, 919 (E.D. La. 1977), *aff'd* 608 F.2d 522 (5th Cir. 1979), should not be viewed as expanding the liability of employers." *Pratico*, 783 F.2d at 265.

A. The Trial Court's Instruction Concerning Evidence of OSHA Standards, If Erroneous, Was Harmless Error.

Assuming, arguendo, that the trial court erred in instructing the jury that OSHA regulations were evidence of negligence, the error was harmless and should not effect the Court's disposition of this case. Review of the entire record indicates that the OSHA standards before the jury were not presented as being legally determinative or having regulatory force independent of their use as evidence of negligence. Additionally, the significance of any mistaken application of OSHA by the jury had little relevance to the outcome of the case in light of the prolonged nature of the injury sustained by the respondent.

The OSHA regulations were presented to the jury with a clear and appropriate indication of both its relevance and scope. Neither the judge's instructions nor the respondent's argument to the jury, ever stated that the OSHA regulations had direct application and independent regulatory effect on the petitioner.

The trial judge instructed the jury generally on the issue of negligence under FELA, indicating that the petitioner had a duty to exercise ordinary care to provide a reasonably safe place to work. (App. at 1a). Additionally, the judge instructed that if any amount of negligence played even the slightest part in the respondent's injury, the petitioner would be liable in money damages. (App. at 1a). The court also instructed that the petitioner had a duty to make proper inspections and tests to discover the dangers in the workplace, and take reasonable precautions. (App. at 1a-2a). The jury was charged

to consider two separate claims—"One, a negligence claim; two, a Federal Railroad Administration, and in parentheses FRA, safety regulation violation claim." (App. at 2a). The court initially instructed very generally on a claim of negligence and proceeded to instruct on the violations of the FRA safety regulations, indicating that if the court failed to find a violation, then they must find for the petitioner on that claim. (App. at 3a). Only after instructing on the FRA safety regulations did the court mention OSHA. Regarding the application of OSHA regulations to the petitioner, the court instructed the jury that it could consider the OSHA regulation merely as one more piece of evidence on the issue of negligence. (Pet. App. at 15a-16a). Contrary to the limited OSHA instruction, the court gave a very specific instruction that the FRA regulations directly applied to the petitioner and were in force and effect at the times and places in question, and that if the jury found that the petitioner violated the FRA regulation, then the petitioner was absolutely liable. (App. at 3a).

Additionally, the respondent's closing argument did not mislead the jury as to the import or relevance of the OSHA regulations. No expert testimony was offered to suggest that OSHA had direct application and independent regulatory effect on the petitioner.

In closing argument counsel for the respondent first addressed the alleged violations of FRA safety regulations, and refuted the petitioner's contention that it complied with them. (App. at 5a). The OSHA regulations were briefly and succinctly referred to only after addressing the FRA violation, and then, only as an indication of the petitioner's notice of them and the petitioner's informed decision not to cover train and engine service employees. (App. at 6a). The respondent's counsel indicated that the petitioner was aware of both the level of noise the respondent was exposed to and that the rail-

road knew of the OSHA rules regarding noise exposure, but it negligently chose not to cover the train and engine service employees. (App. at 5a-6a). He said that such actions of the railroad were unreasonable (not that OSHA had direct application and independent reglulatory effect on the petitioner) based on its failue to assess the hazards to protect its employees. (App. at 6a). Counsel concluded that the railroad failed to follow the standard of the industrial world in coming to the problem of noise and hearing, namely, to identify, abate, and protect. (App. at 7a). At no time during the closing did the respondent's attorney suggest that OSHA was directly applicable against the petitioner.

Additionally, the duration of the petitioner's harm to the respondent was so extensive that any resulting error in applying OSHA would be harmless.

The respondent began working for the petitioner in February of 1956. Not until 24 years later did the FRA issue its hearing regulations, *see* Railroad Locomotive Safety Standards and Locomotive Inspection, 45 Fed. Reg. 21,092 (1980). OSHA's noise regulations were amended in 1983, providing a detailed hearing conservation requirement to be applied when employees' exposure levels equal or exceed the 8-hour time-weighted average sound level of 85 decibels. 29 C.F.R. § 1910.95(c) (1983). The respondent retired from work in 1987. Consequently, OSHA's hearing conservation requirements, even if erroneously applied to the petitioner, could have been considered evidence of negligence in only 4 out of 31 years of employment. The resulting error clearly is not prejudicial.

For the foregoing reasons, any inappropriate admission of OSHA regulations or inappropriate application of the same to the petitioner, constitutes harmless error.

II. THE PRESENT STATE OF CIRCUIT LAW INTERPRETING OSHA'S EXEMPTION CLAUSE DOES NOT INDICATE THE NEED FOR SUPREME COURT INTERVENTION.

The petitioner's second basis for review is that there is an existing circuit split on the interpretation of section 4(b)(1) of OSHA and that the Norfolk Circuit Court has added yet another branch to the split. (Pet. at 11). Specifically, it contends that

> The federal circuits disagree on both (1) what action the "dominant" federal agency must take to effect preemption of generic OSHA regulations, and (2) the scope of . . . the "working conditions" which the dominant agency carves out of OSHA's jurisdiction by the exercise of its seperate regulatory authority.

(Pet. at 11-12).

Initially respondent notes that the Norfolk Circuit Court made no judgment as to the applicability of OSHA regulations regarding noise exposure. To this end, the decision of that court does not invoke any interpretation of section 4(b)(1) of OSHA and thus presents no opportunity for review of any "split" in the federal interpretation of preemption.

Assuming, arguendo, that this Court finds that this case presents an opportunity to consider review of OSHA's exemption clause, the respondent contends that the "split" alleged to exist is the product of petitioner's misinterpretation of existing case law.

A. Federal Circuit Distinctions in Interpreting "Exercise" Are Neither Profound Nor Unreasonable.

Even if this Court determines that the question posed in the present case turns on section 4(b)(1), it still does not warrant review, as there is no real split, and this case presents no new issues. OSHA (29 U.S.C. § 653 (b)(1)) states that,

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The petitioner alleges that the federal circuits are split on interpreting the scope of "working conditions" (and thus the scope of the OSHA exemption) and the meaning of the word "exercise" (and thus whether preemptive regulation has occured by the dominant agency) (Pet. at 11-12). The petitioner has misinterpreted the distinctions between the circuit court interpretations with respect to application of section 4(b)(1), in an attempt to induce the Court's review of this case.

The petitioner alleges that there is profound disagreement among the federal circuits over what constitutes an "exercise" of authority by a domniant agency, pursuant to section 4(b)(1). (Pet. at 12). The petitioner further states that while some courts require that the dominant federal agency "actually promulgate regulations," other courts hold that a mere "assertion of authority in a policy statement is sufficient to displace OSHA regulations." (Pet. at 12). The petitioner relies on the cases of *Velasquez v. Southern Pacific Transportation Co., supra,* and *Southern Pacific Transportation Co. v. Usery,* 539 F.2d 396 (5th Cir. 1976), *cert. denied,* 434 U.S. 874 (1977), in support of the notion that a mere policy statement from a dominant federal agency (the FRA in this case) would constitute an exercise of authority sufficient to invoke the section 4(b)(1) exemption of OSHA.

In the case of *Southern Pacific Transporiation Co. v. Usery,* the Fifth Circuit stated that the FRA, as the dominant agency in its limited area, "[C]an displace OSHA regulations *by articulating a formal position* that a given working condition *should go unregulated or* that *certain regulations*—and no others—*should apply* to a defined subject.'" *Id.* at 392 (emphasis added). This

statement clearly suggests that, whether regulating to the exclusion of other agencies or merely choosing not to regulate, the policy statement must state its regulatory intent with specificity in order for it to have preemptive effect. The court indicated that when it is unclear from a regulation whether the statement is meant to preempt OSHA, "the scope of the exemption created by section 4(b)(1) is determined by the FRA's intent, as derived from its articulations." *Id.* at 392. The plain meaning of *Usery* is that in order for a policy statement to have preemptive effect, the statement must contain some specific "articulation" of the dominant agency's intent to regulate if the statement does not otherwise clearly regulate the working environment.[3]

In *Velasquez v. Southern Pacific*, *supra*, the Fifth Circuit was determining the scope of 4(b)(1) in light of a policy statement issued by the FRA, and concluded that "an assertion of authority in a policy statement is sufficient to displace OSHA regulations." 734 F.2d at 218. The petitioner suggests that this statement stands for the proposition that a mere "policy statement" would be sufficient to invoke 4(b)(1) (Pet. at 12), and in doing so suggests that *Valesquez* is evidence of "profound disagreement among the federal circuits." (Pet. at 12). The petitioner's narrow interpretation of the *Velasquez* holding is not supported by a closer reading of the case.

The question posed in *Velasquez*, as in this case, was whether the trial court appropriately instructed the jury regarding the use of OSHA as an evidentiary standard. The *Velasquez* court concluded that the jury instruction, in conjunction with expert testimony presented at trial, "incorrectly held that railroad to a specific government

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[3] The Eleventh Circuit interpreted *Usery* accordingly, in *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530 (11th Cir. 1986), stating that "The dominant agency *must either promulgate regulations* governing the working condition at issue, *or articulate a policy that the condition not be regulated.*" (emphasis added).

agency standard of care." *Id.* at 219. The issue of 4(b)(1) exemption was addressed in *Velasquez* only as a consequence of a jury instruction that was absolute in its application of a particular agency standard. As a result, the court was forced to determine whether preemption had occurred so as to determine whether the instruction constituted reversible error. Subsequent interpretation of *Velasquez* by the Fifth Circuit in *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570, 576 (5th Cir. 1987), supports respondent's reading of *Velasquez*. The Fifth Circuit stated that "The sole issue in *Velasquez* was whether OSHA or FRA reguations applied to a walkway beside a track, *for purposes of a* personal injury action *jury instruction*." *Id.* (emphasis added). Conspicuously missing from the *Missouri* interpretation is any language regarding preemption.

In light of the foregoing, the *Velasquez* decision is not determinative of the status of federal preemption law, nor is it evidence of profound disagreement among the federal circuits as to what agency action amounts to exercise.

The petitioner also contends that *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913 (3d Cir. 1980), *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *Southern Railway Co. v. Occupational Safety and Health Review Commission*, 539 F.2d 335 (4th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976), and *Baltimore and Ohio Railroad Co. v. Occupational Safety and Health Review Commission*, 548 F.2d 1052 (D.C. Cir. 1976), evince a split in federal circuit interpretation of the term "exercise" when juxtaposed with *Usery* and *Velasquez*. Although the petitioner cites these cases as evidence of "profound disagreement" among the federal circuits, none preclude the interpretation of 4(b)(1) set forth in *Usery*; namely, that a policy statement may have preemptive effect if an intent to do so can be derived from its articulations.

The petitioner interprets each of the foregoing cases as holding that "the preempting agency must actually promulgate regulations, mere declaration of authority over the area is not enough." *Columbia Gas*, 636 F.2d at 916, *Donovan*, 739 F.2d at 777-778, *Southern Railway*, 539 F.2d at 337, and *Baltimore & Ohio*, 548 F.2d at 1053. (Pet. at 12). The *Southern Railway* court, responding to allegations that the exercise of any authority whatsoever by the FRA should preempt the entire field of railway safety, stated that "section 401(b)(1) does not apply where the dominant agency has regulatory authority but has failed to exercise it. 539 F.2d at 336. The court added that "the actual exercise of statutory authority *rather than its mere existence* was contemplated." *Id.* at 337 (emphasis added). The court, responding to a suggested reading of 4(b)(1) that was exceedingly broad in scope, gives no indication that a policy statement that articulated preemptive intent would not be honored by that court as an "exercise" of authority.

Donovan, citing both *Southern Railway* and *Baltimore & Ohio*, explained that section 4(b)(1) "*requires* an actual, *concrete assertion* of regulatory authority as opposed to a mere possession of authority." 739 F.2d at 778 (emphasis added). At no point did the court suggest that a "concrete assertion" could not come in the form of a policy statement. Like *Southern Railway*, *Donovan* did not indicate that a policy statement that articulated preemptive intent would not be honored as an exercise of authority.

Finally, the petitioner cites *Baltimore & Ohio*, as evidence of a split in federal circuit interpretation of the term "exercise." (Pet. at 12). Responding to a notice of proposed rulemaking by FRA and FRA's assertions of intent to adopt a comprehensive code of OSHA safety regulations, the court found that such prospective, broad statements of intent were insufficient to remove OSHA's protective veil. The court noted that it saw no congres-

sional purpose in treating a proposal to act as action itself. *Baltimore & Ohio*, 548 F.2d at 1055. The *Usery* requirement of articulating a formal position in a policy statement is in no way inconsistent with denying preemptive effect to statements which merely address prospective exercises of power or preemption.

The sum of the cases presented, regarding interpretation of the term "exercise," does not suggest "profound disagreement" on the interpretation of section 4(b)(1) as suggested by the petitioner. (Pet. at 12). The foregoing cases suggest that whether the dominant agency chooses to act by regulating or merely leaving an aspect of rail safety unregulated, it must, at least, clearly articulate a formal position regarding its intent.

B. Federal Circuit Distinctions in Interpreting "Working Conditions" Are Neither Profound Nor Unreasonable.

The second aspect of section 4(b)(1), on which the petitioner alleges "the range of opinions is even wider," deals with the preemptive scope of a dominant agency's regulation. (Pet. at 12). The scope of exemption, once authority has been exercised, hinges on the interpretation given to the term "working environment" as used in section 4(b)(1). The petitioner alleges that two interpretations of "working environment" have been adopted by the various federal circuits and that the Norfolk decision represents some third interpretation. The petitioner has misstated the distinctions between the circuit court interpretations of "working environment" in an attempt to suggest inconsistencies, thereby inducing this Court to accept the Petition For Writ Of Certiorari.

The petitioner alleges that there are two approaches to interpreting "working conditions" represented by the various circuit courts and further insists that the two interpretations are contrary. (Pet. at 13). Under the "discrete working environments" approach the scope of

the dominant agency's regulation and thus the preemption of OSHA is determined according to the particular environment being regulated. Thus, if the dominant agency regulates instrumentation in locomotive cabs, any other agencies' attempts to regulate instrumentation within the locomotive cab will be deemed preempted. Under the "discrete hazard" approach favored by *Southern Pacific v. Usery, supra*, and *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981), the scope of preemption is defined according to the "discrete hazard" being regulated. Thus, although the FRA might regulate portable fire extinguishers, OSHA's fire alarm standards would not be preempted. *Southern Pacific v. Usery, supra*, 539 F.2d at 391.

Regarding the basic issue of the existence of two differing approaches to section 4(b)(1) preemption, the respondent and the petitioner are not in disagreement. The petitioner has alleged, however, that the "discrete hazard" standard and the "discrete working environment" standard are indicative of "profound disagreement" in the interpretation and application of section 4(b)(1). (Pet. at 13). The respondent strongly disagrees.

Southern Pacific v. Usery, supra, and *PBR, Inc. v. Secretary of Labor, supra*, although both espousing a narrower "discrete hazard" approach, have clearly left the door open to applying the "discrete working environment" approach, thus broadening the scope of preemption. Specifically, *Southern Pacific v. Usery* does not *favor* the discrete hazard approach, holding instead that the scope of section 4(b)(1) preemption may be "defined either in terms of a 'surrounding' or a 'hazard' . . . ." 539 F.2d at 391. *Southern Pacific v. Usery* interpreted "working conditions" in the same manner that it interpreted "exercise" concluding that, "[T]he scope of the exemption created by section 4(b)(1) is determined by the FRA's intent, as derived from its articulations." *Id.* at 392. The court explained that "the [*Southern Ry v.*

OSHRC] court likewise interpreted section 4(b)(1) in a manner which avoided the extreme positions of the Secretary and the railroads [which suggested readings of 4(b)(1) which were, respectively, extremely narrow and broad scope.]" *Id.* at 391.

PBR addressed the issue of preemption generally, and cited the holding of *Southern Pacific v. Usery, supra,* stating that "OSHA's authority to regulate a given working condition, *defined in terms of a "surrounding" or a "hazard"*, is foreclosed only insofar as another agency has exercised its authority to regulate that working condition." 643 F.2d at 896 (emphasis added). The court appears to have applied the narrower "discrete hazard" standard; however, the court qualified its narrow approach in that instance, noting that "Since the Secretary of Transportation has in no way indicated a broader effect for regulations promulgated by his agency, section 4(b)(1) does not operate to foreclose the Secretary of Labor's exercise of authority in this case." *Id.*

Both *Southern Railway v. Usery* and *PBR, Inc. v. Secretary of Labor* suggest a clear willingness to apply either the "discrete working environments" approach or the "discrete hazards" approach, and interpret the preemptive scope of 4(b)(1) accordingly, depending on the particular regulation in question. Based on the foregoing, the respondent submits that the federal circuit "split" with which the petitioner is concerned is neither profound nor does it produce results which are inconsistent or unpredictable.

C. Decision of the Norfolk Circuit Court Was Consistent With Existing Federal Preemption Law.

Finally, the petitioner alleges that the Norfolk Circuit Court has applied a third basis of review inconsistent with either of the two addressed above. (Pet. at 14). The petitioner argues that the FRA has preempted the OSHA hearing conservation regulations by regulating

both the "discrete working environment," (i.e. the locomotive cab) and the "discrete hazard," (i.e. noise standards). (Pet. at 14). The petitioner further states that "The Norfolk Circuit Court has, in effect, adopted the "nook and cranny" approach flatly rejected by the federal courts—that the OSHA noise regulations are not preempted simply because they are different than the competing FRA regulations." (Pet. at 14).

There is no indication to support the petitioner's allegation that the Norfolk Circuit Court made any decision whatever on the issue of preemption. (*see* Note 1, *supra* at 3). In the event that it did, the record clearly supports a finding that the FRA policy statement at issue did not articulate a clear desire to preempt OSHA on the issue of noise conservation and as such the Norfolk Circuit Court decision is in line with current federal interpretation of 4(b)(1). Below, the petitioner relied upon FRA Policy Statement, 43 Fed. Reg. 10,583 (March 1978), in support of its argument that the FRA has sufficiently exercised authority with respect to hearing conservation so as to preempt application of OSHA regulations on that subject. (Pet. at 5-6). Specifically, the petitioner cites the following statement from the Federal Register:

> FRA views the the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over which the FRA has exercised its statutory jurisdiction. FRA is therefore responsible *for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in light of overall safety considerations.* (emphasis added).

(Pet. at 5-6).

The statement cited by the petitioner, although clearly asserting authority to regulate hearing conservation in

the future, does not indicate a present intent to do so, as all reference to regulatory steps and remedial measures are made with respect to future evaluations. In addition to the foregoing, the FRA indicated the limited substantive effect of the policy with regard to preemption of OSHA, stating:

> This discussion cannot be regarded as definitive, since considerable experience in adjusting the relationship of FRA and OSHA standards will unlikely be required before an optimum Federal regulatory program can be achieved. *All statements concerning OSHA and FRA authority and the applicability of individual regulations should be regarded as statements of general principles.* (emphasis added).

43 Fed. Reg. at 10,587. The Policy Statement further stated that:

> As the primary regulatory agency concerned with railroad safety, FRA will not hesitate to adopt its own standards to assume a safe environment for railroad operations and to promote regulatory consistency.

Id.

The foregoing statements, in conjunction with the FRA's failure to regulate in the critical area of hearing conservation, support a finding that the FRA's policy statement expressed nothing more than a future intent to regulate the issue of hearing conservation. Such a finding is insufficient to preempt OSHA regulations on the subject. *Baltimore & Ohio, supra; Southern Pacific Transportation Co. v. Usery, supra.*

III. FELA'S CHOICE OF FORUM PROVISION DOES NOT PROVIDE A BASIS FOR GRANTING PETITION.

The petitioner cites, as an independent ground for granting this petition, "the potential for forum shopping in the wake of state court decisions below." (Pet. at 16).

The petitioner's dissatisfaction with FELA's forum provision does not provide grounds for granting this petition. The potential for forum shopping with respect to FELA claims has been present since the Act's inception. *Peterson v. Ogden Union Railway & Depot Co.*, 175 P.2d 744, 747 (1946) explained the purpose of 45 U.S.C. § 56:

> It was not only for his [plaintiff's] convenience and to enable him to choose a court where the expense of litigation would not be prohibitive, *but it was to give him the right to select the court in which he considers it would be most advantageous for him to bring his action.* (emphasis added).

The case law is clear that the petitioner is knocking at the wrong door with this request for relief. This Court has traditionally protected the right granted by 45 U.S.C. § 56. Regarding contractual modification of the right to choose a favorable forum, this Court indicated that the plaintiff's "right to bring suit in any eligible forum is a right of sufficient substantiality" that, pursuant to 45 U.S.C. § 55, could not be altered, even by mutual consent. *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263 (1949). This Court recognized in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 434 (1965), that "Congress, in providing for concurrent state and federal court jurisdiction and prohibiting removal of FELA cases to federal courts, has sought to protect the plaintiff's right to bring an FELA action in state court."

Finally, the railroad has available to it the doctrine of *forum non conveniens to* prevent adverse effects from forum shopping. This Court has spoken regarding application of that doctrine in *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 4-5 (1949), where it held that state courts may deny access to persons seeking recovery under FELA, "if in similar cases the State for reasons of local policy denies resort to its courts and

enforces its policy impartially, so as not to involve a discrimination against the Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution." [4] Relief from FELA's choice of forum clause should be sought not in this Court but in Congress.

CONCLUSION

The Petition for Certiorari should be denied for the reasons set forth herein.

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[4] At the time this claim was brought, Virginia had a statute in effect which prevented trial courts from dismissing any out-of-state actions on the ground of *forum non conveniens*. In *Caldwell v. Seaboard System R.R., Inc.*, 380 S.E.2d 910, 912-913 (Va. 1989), *cert. denied*, 110 S.Ct. 1169 (1990), the Virginia Supreme Court held that the statute was valid and that the appropriate means of redress would be before the state legislature. The Virginia legislature subsequently repealed that legislation, effective July 1, 1991.

APPENDICES

APPENDIX A

CROSS-EXAMINATION OF DR. LIPSCOMB

[572] MR. WEBSTER: Isn't it a fact, Doctor Lipscomb, that Mr. Wallace as an engineer is governed by and controlled by the Federal Railroad Administration regulations?

DR. LIPSCOMB: That's my understanding—Yes. [Objected to, as calling for a legal conclusion—Objection sustained]

[592] MR. WEBSTER: Dr. Lipscomb, in view of your experience and education, wouldn't you agree that there is no hearing conservation program specified by the Federal Railroad Administration for train and engine personnel Like Mr. Wallace?

DR. LIPSCOMB: Any hearing conservation—my understanding is that by OSHA, the agreement, the court ruling is that the FRA is the active component of federal law.

* * * *

INSTRUCTIONS BY THE COURT

[1200] Under the federal Employers' Liability Act Defendant is liable in money damages if Defendant, through its agents, servants, or employees, acting in the scope of their agency or employment, were negligent, however slight, and the negligence played any part, however small, in producing the injury for which damages are sought.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something [1201] that a reasonably careful person would do under like circumstances.

An employer such as the Defendant railroad has a continuous duty to exercise ordinary care under the circumstances to provide its employees with a reasonably

safe place to work and with reasonably safe and suitable equipment with which to work.

If a railroad fails to perform this duty, then it is negligent.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case.

[1203] The railroad-employer must make proper inspections and tests to discover dangers in places where its employees must work, and, after ascertaining their existence, must take reasonable precautions for the safety of the employees. The employees have the right to rely on the performance of that duty by the employer and have the right to govern their actions accordingly.

Local usage and general custom of Defendant or the railroad industry do not justify or excuse negligence. Adherence to customary safety standards which the employer knew or should have known were not reasonable constitutes negligence.

[1204] The Court instructs the jury that in your deliberations you are to consider two separate claims made by Bruce L. Wallace against Southern Railway Company in this case: One, a negligence claim; two, a Federal Railroad Administration, and in parentheses FRA, safety regulation violation claim.

The rules of law that apply to these claims are different; this instruction will tell you the rules to apply.

You shall find your verdict for Bruce L. [1205] Wallace on his negligence claim if he proved by the greater weight of the evidence: One, that the railroad was negligent; and, two, that the railroad's negligence was a cause in whole or in part, however small, of Bruce L. Wallace's injuries.

If Bruce L. Wallace proved failed to prove either or both of the two elements above, then you shall find for the railroad on the negligence claim, but you then must consider the remainder of Bruce L. Wallace's claim against the railroad.

You shall find your verdict for Bruce L. Wallace on his FRA safety regulation violation claim if he proved by the greater weight of the evidence: One, that the railroad violated a FRA regulation enacted for the safety of employees, including Plaintiff; and, two, that the railroad's violation was a cause in whole or in part, however small, or Bruce L. Wallace's injuries.

If Bruce L. Wallace failed to prove either or both of the two elements above, then you shall find for the railroad on the FRA safety regulation violation claim, but you then must consider the remainder of this instruction.

If you find your verdict for Bruce L. Wallace on both the negligence claim and for the FRA safety regulation violation claim, or on the FRA safety [1206] regulation violation claim alone, then you shall proceed to determine the damages according to the instructions the Court will give you in a moment.

If Bruce L. Wallace fails to prove either the negligence claim or the FRA safety regulation violation claim, then you shall find your verdict for Defendant.

[1208] The Court instructs the jury that in force and effect at the times and places in question was the following Federal Railroad Administration regulation: 49 Code of Federal Regulations, Section 229.121 *et seq.*

And this is in quotation and parentheses.

(a) After August the 31st, 1980 the permissible exposure to a continuous noise in a locomotive cab shall not exceed an eight-hour time weighted average of 90 dBA.

The Court further instructs the jury that the regulations of the Federal Railroad Administration have the same force and effect as though prescribed in terms by statute, and they become an integral part of the Federal Employers' Liability Act, so that a violation of the regulations is the same thing as a violation of the statute.

If you find that Plaintiff has proved by the greater weigth of the evidence that the railroad was in violation of the FRA regulations, 49 C.F.R. Section 229.121, *et seq.*, with respect to the noise levels inside the locomotive

engines to which the Plaintiff was assigned [1209] at the times and places in question, and that such violations contributed in whole or in part, however small, to Plaintiff's injuries, then Defendant is absolutely liable.

For purposes of this action, injury, or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from a preponderance of the evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damage suffered by the Plaintiff, you may find that such injury or damage was caused by the Defendant's act or omission.

APPENDIX B

CLOSING ARGUMENT OF MR. DONATO

[1222] On the question of the FRA, the Federal Railroad Administration, standard for noise levels, which will be given to you in the instruction, we learned, and it was uncontradicted, that Dr. Lipscomb had his own tests, that he relied on tests that he had gotten from the railroad's own people. He did not come here to deny them. That 112 decibels was the figure—there were no figures lower the railroad gave them from a test of Mr. Harris, if you remember that name being mentioned. 112 decibels times—this is the time weighted average—times the number of minutes if you took 125 crossings and multiplied that by the number of seconds, 35 or 40, you came out with what the 72 minute exposure in an eight to [1223] 10-hour day, that violated the FRA.

I believe when the Defendant opened his case he indicated that compliance with the FRA would be their case. There is no evidence in this case that supports compliance with the FRA back before 1989, back before they made the changes, back before Mr. Wallace was working as a locomotive engineer.

Now, let's talk a little bit about the negligence question. The negligence question has to be seen, in addition, in the context of some of the evidence produced by Dr. Lipscomb. I'm thinking particularly at this point of the evidence he went through called the milestones when he pointed out what the industrial world in America knew 30, 40, 50, 60, 70, into the 19th Century, what the scientific people knew, what they passed along, specifically what the railroad industry knew about noise in the workplace. And I believe that he said in 1956, I believe it was, the American Railroad Surgeon's—I can't recall the exact name of it, but it was the surgeons for the American Railroad Association or words to that effect had a meeting and all of this was discussed.

Now, why is this important to us? It's important to us because it tells you that when you ignore the information out there, and you are the company, you're [1224] the employer, and you're required to provide a safe place to work, which you are, and you choose not to do so but to ignore what's out there to learn from, then you are negligent. You're not reasonable. You're not acting in a reasonable manner. You're not taking care of business in the right way.

And so we have the question of negligence established on the basis of that.

What else do we know? We know that the railroad was generally aware of the OSHA, Occupational Health and Safety Act, rules regarding noise levels, that they knew about those, that they existed prior to any hearing conservation program of the OSHA. That came in in '84. What I'm talking about, noise levels and exposure levels.

And in fact the railroad in what can only be considered a sort of strange view of the world or following the minimum, I think, takes care—if the Government says we've got to cover these guys we'll cover them. Okay. That's OSHA. That applies to them. But it doesn't apply to the T and E people. We don't have to give them hearing protection. We don't have to give them any kind of hearing conservation. That's not required.

Is that the view, members of the jury, of someone who's acting reasonably? Is that the view of [1225] someone who is not negligent? In what way were they negligent?

They really failed to identify the problem on their own. They failed to study it. They failed to measure the sounds. They failed to go out and monitor their own equipment to see what the sounds were, what the levels were, and what was causing them. They failed to test their own employees. They had this haphazard program.

[1227] And with regard to this negligence on the [1228] part of the railroad, remember what Dr. Lipscomb said the industrial world's standard was in coming to noise and hearing, and that was, first of all, identify, abate, which is stop, and protect.

The railroad failed to do any of those things. They ignored this problem. They ignored its consequences. They ignored what happened to Bruce Wallace.

(3)

No. 91-406

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

BRUCE L. WALLACE,

Respondent.

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a railroad may properly be held liable under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"), for damages allegedly sustained by an employee aboard a locomotive based on the railroad's failure to comply with a regulation issued under the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* ("OSHA"), where another federal agency (the Federal Railroad Administration, or "FRA") has exercised plenary authority over all facets of locomotive safety by issuing and enforcing standards and regulations under the Boiler Inspection Act of 1911, 45 U.S.C. § 23, *et seq.* ("BIA") and the Federal Railroad Safety Act of 1970, 45 U.S.C. §421, *et seq.* ("FRSA"), given that OSHA, by its terms, does not apply "to working conditions with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards affecting occupational safety or health." 29 U.S.C. § 653(b)(1).

2. Alternatively, whether a violation of an OSHA regulation may properly be used as a basis upon which to impose liability on a railroad under the FELA for an employee's workplace injury when OSHA explicitly declares that it shall not be construed to "enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries . . . arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4).

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IN THE

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OCTOBER TERM, 1991

No. 91-406

SOUTHERN RAILWAY COMPANY,

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BRUCE L. WALLACE,

Respondent.

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This brief of the Association of American Railroads and the National Association of Railroad Trial Counsel is filed with the consent of the parties, the letters expressing such consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads ("AAR") is a voluntary, unincorporated, non-profit trade organization, headquartered in Washington, D.C. Its members constitute the vast majority of the nation's railroads, operating approximately 85 percent of the line-haul mileage, producing approximately 93 percent

of the freight revenues and employing approximately 90 percent of the railway work force in the United States. In most areas of operation, AAR members are regulated exclusively by the Federal Railroad Administration ("FRA") under various railroad safety statutes. In particular, FRA regulates all facets of design, construction, inspection and safety of locomotives.

There are often differing requirements under FRA regulations and those issued by other federal agencies, and railroads clearly have an interest in—indeed a compelling need of—knowing with which regulations they must comply—those issued by FRA or those issued by other agencies under general subject matter grants of regulatory authority. This interest stems in part from the need to maintain a uniform national system of regulation necessary for nationwide safety and efficiency of railroad operations. Moreover, under the fault-based FELA,[1] a violation of an FRA safety regulation imposes absolute FELA liability for any injury caused in whole or in part thereby. Thus, AAR members have an obvious interest in the related question of whether they may be held liable under the FELA for injuries sustained on a locomotive allegedly caused by a failure to comply with generic OSHA

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[1] Past decisions by this Court require the following railroad safety statutes to be read *in pari materia* with the FELA: The Safety Appliance Act of 1893, 45 U.S.C. § 1, *et seq.* (*St. Louis, I.M. & S.R.Co. v. Taylor*, 210 U.S. 281 (1908)); the Boiler Inspection Act of 1911, 45 U.S.C. § 23, *et seq.* (*Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481 (1941)); and the Hours of Service Act of 1907, 45 U.S.C. § 61, *et seq.*, (*Baltimore & O. Ry. v. Wilson*, 242 U.S. 295 (1916)). In addition, the Rail Safety Act of 1970, 45 U.S.C. § 421, *et seq.* ("FRSA") is so read by virtue of an express provision therein. 45 U.S.C. § 437(c).

requirements when they have fully complied with all FRA locomotive safety requirements.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated, non-profit organization headquartered in Los Angeles, California. Its membership consists of more than 1,200 trial lawyers who represent all significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of the legal problems associated with railroad personal injury cases, including those filed by employees under the FELA and related statutes, with a particular focus on the substantive law and the strategy and tactics to be used in trials thereof.

STATUTES INVOLVED

Section 2 of the Boiler Inspection Act of 1911 provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive, unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. [As

amended June 7, 1924, ch. 355, § 2, 43 Stat. 659.]

45 U.S.C. § 23.

Section 4(b)(4) of the Occupational Safety and Health Act of 1970 provides:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4).

SUMMARY OF ARGUMENT

Amici curiae agree with Petitioner that there are special and important reasons for review of the decision below. That decision upheld a FELA jury verdict that was prejudicially tainted by counsel's arguments and the trial court's instructions that the railroad could be found negligent for failing to comply with an OSHA regulation requiring a "hearing conservation" program not required under FRA's 1980 regulations on locomotive noise.[2]

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[2] The locomotive noise regulation in question (49 CFR § 229.121) was issued by FRA under its Locomotive Inspection Act authority along with other regulations pertaining to the details of various locomotive equipment and appurtenances. *See*, 45 Fed.Reg. 21,092, *et seq.*, (1980). FRA's discussion of the considerations involved in locomotive noise included the fact that

In addition to the conflicts described in the Petition, *amici curiae* submit yet an additional reason of critical importance warranting review of the decision below—its inconsistency with this Court's decisions on the federal statute specifically enacted to achieve locomotive safety. Under those decisions, this Court held that Congress occupied "the entire field" of locomotive safety by the complete delegation of regulatory authority over the same to the ICC under the 1924 amendments to the Boiler Inspection Act, 45 U.S.C. § 23, *et seq.* ("BIA").[3] Moreover, it is clear that when the FRSA was enacted in 1970, Congress intended to expand rather than contract FRA's regulatory authority. Finally, in addition to OSHA regulations having no application to a locomotive by reason of FRA's exercise of its regulatory jurisdiction, Congress expressly stated that OSHA was not to be

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less than 5% of in-service locomotives had noise in excess of the prescribed limits, opining that most of those could be brought into compliance by simple maintenance procedures such as improved seals and gaskets, electric panels, new methods of air brake piping, and relocation of the horn. *Id.*, at 21,105. FRA also rejected certain OSHA requirements pertaining to certain types of noise limits for the express reason that noise of the type involved "is normally not present in the locomotive cab," it being "normally associated with industrial processes." *Id.*, at 21,106.

[3] Boiler Inspection Act authority was originally delegated to the Interstate Commerce Commission ("ICC"). That authority was later redelegated to the Department of Transportation. *See*, 49 U.S.C.App. § 1655(e)(1)(d), and then sub-delegated by statute to the FRA, *see*, 49 U.S.C. § 103 (c)(1). With the passing of the steam engine, the Boiler Inspection Act is now often referred to as the "Locomotive Inspection Act," but to maintain its historical context, it will be generally referred to herein as "BIA."

construed to affect statutory liability for workplace injuries, like that imposed by the FELA.

ARGUMENT

I. FRA'S EXERCISE OF BOILER INSPECTION ACT AUTHORITY OVER LOCOMOTIVE SAFETY PRECLUDES OSHA NOISE REGULATIONS FROM APPLYING TO LOCOMOTIVE CABS

Just prior to the turn of the century, Congress entered the field of railroad workplace safety by establishing standards for certain railroad equipment (brakes, couplers, grab-irons, *etc.*) under the Safety Appliance Act of 1893, 45 U.S.C. § 1, *et seq.* Enforcement was delegated to the ICC. In 1911, Congress responded to additional railroad safety concerns by enacting the BIA, delegating to the ICC the supplemental power to inspect locomotive boilers. In 1924, Congress amended the BIA by delegating complete jurisdiction over every facet of locomotive safety to the ICC.[4] The ICC (and its statutory successor, the FRA) have continuously exercised that jurisdiction to this day.

In *Napier v. Atlantic Coast Line Ry.*, 272 U.S. 605 (1926), the Court reviewed the BIA's history, and held it to manifest a Congressional intent to "occupy the entire field" of locomotive safety:

> Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously, it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do

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[4] Act of June 7, 1924, ch. 355, §2, 43 Stat. 659.

> so by the original Boiler Inspection Act, since its provisions were limited to the boiler. [Citation omitted.] But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.
>
> * * *
>
> * * * The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not "in proper condition" for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.

Id., at 611-12. *Napier*'s holding on the extent of the delegation to the ICC was further reinforced in *United States v. Baltimore & O. Ry.*, 293 U.S. 454 (1934), and later played a prominent role in establishing BIA's applicability to occupational disease cases brought under the FELA in *Urie v. Thompson*, 337 U.S. 163, 191-94 (1949).

Congressional concern with railroad safety culminated in 1970 with the enactment of FRSA. Two months later, the same Congress enacted OSHA.

By its terms, OSHA does not apply where another federal agency exercises statutory authority over working conditions:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1). Statutory authority over locomotive safety has been exercised for many years by "another federal agency" (the ICC, and later the FRA) under the BIA's broad delegation of authority over locomotives. That authority has been exercised through orders and regulations on design criteria, construction, materials, tests, inspections, and safety standards pertaining to all parts and appurtenances of locomotives.[5] These have been enforced through civil penalties in amounts up to $20,000 per BIA violation. 45 U.S.C § 34. FRA's exercise of BIA and FRSA authority over locomotive safety simply makes OSHA inapplicable.

It is incongruous to require a railroad to comply with FRA locomotive regulations on a day-to-day basis, and, notwithstanding its compliance, later subject it to FELA liability for a failure to comply with OSHA requirements. This is particularly so when the OSHA requirements are set forth in a generic regulation which has nothing to do with locomotives. It is even more incongruous where, as here, the BIA standards issued by the ICC and FRA were designed not only to assure a maximum degree of safety for both rail-

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[5] *See*, 49 CFR §§ 223.1, *et seq.*; 229.1, *et seq.*; 231.15-.16; 231.29-.30; 232.10, *et seq.*; and 236.0, *et seq.*

road employees and the public, but also to accommodate the operating necessities and characteristics of complex railroad locomotive equipment.[6] The interplay between these factors caused Congress to delegate full jurisdiction and responsibility over locomotive safety originally to ICC, and in recent years to FRA. Thus, FRA's exercise of its BIA authority renders OSHA inapplicable by its very terms.

BIA's preemption of OSHA in matters relating to locomotive safety is paralleled in other areas, either where a specific subject-matter statute is involved (*e.g.*, the Safety Appliance Act governing brakes, couplers, grab irons, *etc.*), or where FRA has exercised its authority under a general railroad safety statute such as FRSA. While arguments can be made as to the extent to which FRA must act under FRSA before triggering OSHA's non-applicability provision (*see, e.g., Southern Railway Co. v. OSHRC*, 539 F.2d 335 (4th Cir. 1976) and other cases discussed in the

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[6] The safety considerations pertaining to a locomotive are complex, since they involve the safety of both the employee as well as the public. The question of locomotive noise is not isolated, as it involves both operating and safety factors. For instance, FRA requires for the public's safety a locomotive horn with a specified *minimum* level of loudness. 49 CFR § 229.129. FRA requires an air brake system which must be capable of being actuated immediately for stopping purposes, which entails noise, the sound of escaping high-pressure air. 49 CFR § 229.46. The FRA regulations also specify that certain in-cab warning alarm devices must be "clearly audible throughout the cab." 49 CFR § 236.513. These diverse considerations are reflected in the FRA standards for locomotive cab noise. 49 CFR § 229.121. It should be noted that the FRA has issued additional noise regulations covering *external* noises made by idling and moving locomotives. The standards vary, depending on the year the locomotive was manufactured. 49 CFR § 210.21, *et seq.*

Petition), it is clear that FRSA did nothing to diminish the FRA's long-standing exclusive authority over locomotive safety.

II. OSHA PROVIDES THAT IT SHALL NOT AFFECT IN ANY MANNER THE LIABILITY OF EMPLOYERS FOR WORKPLACE INJURIES

Assuming *arguendo* there was no preemption of OSHA by virtue of FRA's exercise of authority, allowing the jury below to base FELA liability on an OSHA violation raises an alternative, subsidiary issue of considerable importance - it is contrary to a statutory provision wherein Congress explicitly declared that nothing in OSHA:

> . . . shall be construed to . . . enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries . . . arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4). Thus, the instructions and verdict below were clearly contrary to this statutory proscription. Despite the clarity of this Congressional mandate, some federal circuit decisions have sanctioned the affirmative use of OSHA regulations as a basis to affect employer and employee liability in personal injury cases.[7] There is scant support, however,

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[7] Notwithstanding the express terms of 29 U.S.C. § 653(b)(4), there is a deep split between the federal circuits on the effect to be given a violation of an OSHA regulation. *See, Minichello v. U.S. Trucking Industries, Inc.*, 756 F.2d 26, 29 (6th Cir. 1985) ("OSHA regulations can never provide a basis for liability because Congress has specified that they shall not."). *Compare Albrecht v. Baltimore & O. Ry.*, 808 F.2d 329, 332 (4th Cir.

to justify such a departure from such explicit statutory language, as statutory interpretation begins with the language of the statute itself. *Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, ___ U.S. ___ ,111 S.Ct. 1156, 1163 (1991). Where the language of the statute is clear, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)(quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Moreover, OSHA's provision that it not "affect in any manner" common law or statutory claims (which includes FELA claims) is in marked contrast with FRSA (enacted just two months earlier) wherein the same Congress specifically directed that FRA's regulations "shall" substantially affect the liability of a railroad under the FELA:

> All . . . regulations . . . prescribed by the Secretary under this title . . . shall have the same force and effect as a statute for purposes of the application of sections 3 and 4 of the Act of April 22, 1908 [45 U.S.C. §§ 53 and 54] relating to the liability of common carriers by railroad for injuries to their employees.

45 U.S.C. § 437(c). Under 45 U.S.C. §§ 53 and 54, a violation of a FRA regulation issued pursuant to a railroad safety statute such as the BIA has a major effect in a FELA trial. In such a case, the employee

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1987) (violation of OSHA regulations may be considered as evidence of negligence, but not as negligence *per se*); and *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985) (violation of OSHA regulation is negligence *per se* and imposes absolute liability).

need prove only the violation and that his injury resulted in whole or in part therefrom. Such proof not only relieves the employee of the burden of proving negligence, but also renders contributory negligence inapplicable, so as to preclude the reduction of damages in proportion to the employee's contributory negligence. *See, Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969).[8] Given that the same Congress had recently mandated that a violation of a railroad safety statute *would* affect FELA cases, it defies reason to impose FELA liability on the basis of an OSHA regulation when Congress affirmatively provided that OSHA *should not be used* for such a purpose.

Thus, since the ruling below totally ignores the exclusive jurisdiction over locomotive safety exercised by FRA under the Boiler Inspection Act, and, alternatively, uses a violation of an OSHA regulation as the basis upon which to impose liability for workplace injuries under the FELA notwithstanding OSHA's express proscription against such use, it involves important questions of federal law warranting review by this Court.

CONCLUSION

For the foregoing reasons, *amici curiae* submit that the petition for a writ of *certiorari* should be granted.

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[8] Only the violation of a published FRA standard is given this effect. Proof of the availability of parts or appurtenances which are safer or more effective is insufficient to prove a BIA violation. *Baltimore & O. Ry. v. Groeger*, 266 U.S. 521 (1924).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BRUCE L. WALLACE,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of the City of Norfolk, Virginia

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its petition for certiorari, Southern Railway Company demonstrated that the Virginia state court's admission of certain Occupational Safety and Health Administration ("OSHA") regulations in a Federal Employers' Liability Act ("FELA") hearing loss case was clear error that raises an important and recurring issue of federal law, which has not been decided by this Court and which has been the subject of conflicting interpretations by the federal courts of appeal. Indeed, the decision below widened the split among the courts on the proper interpretation of section 4(b)(1) of the Occupational Safety and Health Act of 1970 ("OSH Act"), which allows "dominant" industry-specific federal agencies to preempt generic OSHA regulations. Respondent, while recognizing the existence of this split, makes four arguments against review: (1) that even if OSHA noise exposure regulations are preempted, their admission as

evidence of negligence was not error; (2) that any error was harmless; (3) that the circuit split on section 4(b)(1) preemption is not "profound"; and (4) that the potential for forum shopping in FELA cases is irrelevant to the Court's disposition of the petition. Respondent's arguments are not only baseless, but underscore the clear need for this Court's review.

1. Respondent does not dispute that the Federal Railroad Administration's ("FRA") exercise of its independent statutory authority has rendered OSHA noise regulations inapplicable to locomotive cabs.[1] Nor does he dispute that the court below instructed the jury that petitioner could be found negligent for failing to comply with those OSHA regulations in its locomotive cabs. Instead, respondent jumps to the startling and unsupportable conclusion that allowing a jury to base a negligence finding on the defendant's noncompliance with wholly inapplicable safety regulations is not error. No case—including the four "authorities" cited by respondent—has so held. In fact, in three of those cases, there was no dispute that the OSHA regulation in question *was* applicable, and the courts held only that violation of an *applicable* OSHA regulation is admissible as evidence of negligence.[2] And, the court of appeals in the fourth case held that a district judge *did err* when he included a

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[1] In his discussion of the circuit splits, the respondent does state that the FRA's 1978 Policy Statement "is insufficient to preempt OSHA regulations." Brief in Opposition at 19. Of course, the FRA did much more than issue a policy statement with respect to noise exposure; it promulgated specific "Locomotive cab noise" regulations. *See* Petition at 6.

[2] *See Rabon v. Automatic Fasterners, Inc.*, 672 F.2d 1231, 1238 (5th Cir. 1982); *Albrecht v. Baltimore & O.R.R.*, 808 F.2d 329, 332 (4th Cir. 1987); *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 266-67 (1st Cir. 1985). Indeed, the *Pratico* court devoted more than three pages of its opinion to the analysis supporting its express conclusion that the OSHA regulation was applicable. *Id.* at 258-62.

negligence per se instruction based upon violation of an inapplicable OSHA noise regulation.[3]

Establishing a regulation's applicability to the defendant's conduct is an absolute prerequisite to reliance on the defendant's noncompliance with that regulation as evidence of its negligence. Thus, while "violation of an enactment or regulation . . . may be relevant evidence bearing on the issue of negligent conduct," Restatement (Second) of Torts § 288B(2) (1965), where there is no applicability, there plainly can be no violation. *See also Ellis v. Caprice*, 233 A.2d 654, 662 (N.J. Super. Ct. App. Div.), *certif. denied*, 235 A.2d 901 (N.J. 1967) (noting that since the statute in question was inapplicable to the defendant's building, its breach was not admissible as evidence of his negligence, and that, in any event, "any probative value it possessed would have been more than offset by the possibility of prejudice arising from its submission to the jury"); W. Page Keeton *et al.*, Prosser and Keeton on the Law of Torts, § 36, at 220 (5th ed. 1984) (court must determine whether regulation "is applicable to the particular case, and whether it has in fact been violated").[4]

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[3] *See Barger v. Mayor & City Counsel of Baltimore*, 616 F.2d 730, 733 (4th Cir. 1980) *cert. denied*, 449 U.S. 834 (1980). That court affirmed *only* because the defendant had failed to make any inapplicability objection at trial and because, in that case, strict application of the Federal Rules of Civil Procedure did not result in a "miscarriage of justice." *Id.*

[4] Respondent's attempt to characterize OSHA noise regulations as relevant evidence of "custom" in the railroad industry is similarly misguided. The term "custom" denotes common practice in an industry. Where, as here, the regulations in question do not apply to the industry in question and were developed with *different* industries in mind and without consideration of the specific safety concerns of the industry in question, *see* note 5, *infra*, they clearly are not probative of industry custom. This is particularly true where, as here, competing industry-specific regulations are available (and were admitted).

Moreover, acceptance of respondent's "no error" theory would effectively write section 4(b)(1) preemption out of the OSH Act. Negligence standards regulate behavior just as statutes and regulations do. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). Thus, no matter how clear the dominant federal agency's exercise of its independent statutory authority to regulate workplace safety in a specific industry and no matter how strong the public interest in that agency's displacement of the generic OSHA regulations,[5] if respondent's theory were to prevail, employers would be forced—by the very real threat of crippling FELA negligence awards—to comply with putatively inapplicable OSHA regulations. Congress has not given the courts—state or federal—any such authority to regulate federal agency jurisdictional boundaries.

2. Respondent cites *no* authority for his equally baseless claim that the lower court's error in admitting the OSHA regulations and instructing the jury on their relevance was harmless. Respondent's theory appears to be that admission of and instruction on inapplicable regulations is harmless so long as the inadmissible evidence is not excessively emphasized and there is other evidence upon which the jury could rely. *See* Brief in Opposition at 7-8. Even were respondent's theory in accord with applicable law—and it is not—OSHA's noise exposure regulations were a *central* component of the respondent's case below: the respondent's expert referred to those

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[5] As the Association of American Railroads and the National Association of Railroad Trial Counsel illustrated in their amicus brief, there are a number of competing safety considerations in regulating noise levels in locomotive cabs. For example, locomotive horns must be loud enough to warn the public, but not so loud as to injure employees. *See* Amicus Brief at 9 n.6. Moreover, the use of personal hearing protection devices is constrained by the need to preserve the alertness of employees to hazards to passengers, bystanders, and other employees. *See* Petition at 6. The FRA noise exposure regulations respond to these industry specific safety concerns; OSHA's generic noise regulations obviously do not.

regulations more than a dozen times;[6] his counsel focused on the regulations in his closing argument, *see* Brief in Opposition App. at 6a, and the court specifically instructed the jury on the relevance of the OSHA regulations, *see* Petition App. at 15a-16a. Thus, even under respondent's erroneous standard, the lower court's use of inapplicable OSHA regulations was not harmless.[7]

In any event, respondent seriously misrepresents the relevant harmless error standard. "The general rule, usually stated without qualification, is that when one of two or more issues submitted to the jury was submitted erroneously, a general verdict cannot stand because it cannot be determined whether the jury relied upon the improper ground." *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1299 (10th Cir. 1989).[8] The jury in this case was repeatedly exposed to the erroneously admitted

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[6] *See, e.g.*, Transcript Vol. II-B at 494-95; *id.* at 497-99; *id.* at 508; Vol. III at 531; *id.* at 538; *id.* at 540-41; *id.* at 611-14; *id.* at 617; *id.* at 619.

[7] While respondent finds comfort in the fact that the jury was never flatly told that OSHA regulations "had direct application and independent regulatory effect on the petitioner," Brief in Opposition at 7, it is perhaps more significant that the jury was never told that OSHA noise exposure regulations do *not* apply to locomotive cabs. Instead, the jury was repeatedly informed during trial of the existence and content of the OSHA regulations and of petitioner's noncompliance with those regulations. In addition, the court specifically instructed the jury on the existence and content of the OSHA regulations and told them to consider the regulations "as evidence of negligence." It would be an odd juror indeed who could have come away from this process with the opinion that the OSHA noise exposure regulations did not apply to the petitioner's conduct.

[8] *See also Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *E.I. Du Pont De Nemours v. Berkley & Co., Inc.*, 620 F.2d 1247, 1258 n.8 (8th Cir. 1980) (new trial appropriate unless "it is reasonably certain that the jury was not significantly influenced by the issues erroneously submitted to it"); *Jordan v. Medly*, 711 F.2d 211, 219 (D.C. Cir. 1983) (new trial appropriate unless one can say "with fair assurance . . . that the judgment was not substantially swayed by the error").

OSHA regulations and the petitioner's noncompliance with those regulations. As the Fifth Circuit recently held in a section 4(b)(1) preemption case, instructing a jury that "violation" of an inapplicable OSHA standard "is evidence of negligence" *is reversible error* because it "creates 'a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.'" *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218-19 (5th Cir. 1984), quoting, *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981). It is simply impossible on this record to reasonably conclude that the jury would have ruled against petitioner if there had been no discussion of or instruction on the inapplicable OSHA regulations, and thus the error below was not harmless.[9]

3. Respondent's attempt to downplay the circuit splits on section 4(b)(1) preemption is also unavailing. Although respondent professes an inability to see these circuit splits, the courts themselves apparently labor under no such disability. *See, e.g., Donovan v. Red Star Marine Services*, 739 F.2d 774, 778 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) ("circuit and district courts . . . have not interpreted section 4(b)(1) consistently"); *Marshall v. Northwest Orient Airlines*, 574 F.2d 119, 122 (2d Cir. 1978) (noting conflict between Fourth and Fifth Circuits on the interpretation of "working conditions," the court stated "[t]he exact standard to be applied in determining the scope of preemption, however, is less

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[9] The fact that OSHA's noise regulations were not promulgated until 1973, while respondent's exposure began in 1956, is also insufficient to clear the harmless error hurdle. The erroneously submitted OSHA regulations were a major element of respondent's case, and one certainly cannot say with "fair assurance" or "reasonable certainty" that the jury was not swayed by petitioner's noncompliance with those government standards. In any event, the defective instruction included no temporal limitation on the jury's consideration of the OSHA regulations as "evidence of negligence."

than crystal-clear"); *Columbia Gas v. Marshall*, 636 F.2d 913, 916-17 & n.8 (3d Cir. 1980) (adopting the Fourth Circuit's "environmental area" definition of "working conditions" in lieu of "the more fluid definition" developed in the Fifth Circuit); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 392 n.10 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) (describing its interpretive approach as "more attuned to the differing possible meanings of the term 'working conditions' as it is used elsewhere in the field of industry relations" than that of the Fourth Circuit). As noted in the petition, these conflicts not only exist and cause inconsistent results in real cases, they impact all of the employers and the employees in many of the nation's largest industries. *See* Petition at 11.

Respondent's final attempt to draw the Court's attention away from these obvious and important circuit splits is his assertion that this case does not raise the section 4(b)(1) issue. On the contrary, the court below was clearly presented with the section 4(b)(1) preemption issue; counsel for petitioner repeatedly argued that FRA preemption barred the admission of and instruction on OSHA noise exposure regulations. *See* Petition at 8. Nevertheless, the court admitted the OSHA regulations into evidence and instructed the jury that they could consider noncompliance with those regulations as evidence of negligence. *See* Petition at 6a-7a. Section 4(b)(1) preemption was properly raised and ruled upon.

4. Finally, respondent claims that it would be improper for this Court to consider the FELA choice of forum provision in deciding whether to grant the petition. Respondent misapprehends petitioner's argument. It is not petitioner's position that this Court should grant it "relief" from FELA's choice of forum provision. Nor does petitioner assert that the mere existence of forum shopping would warrant this Court's review. Petitioner does contend that the unique FELA choice of forum pro-

vision magnifies the importance of any error or court split on an issue of substantive law relevant in FELA proceedings. Because plaintiffs can choose from a variety of forums, the decision of a single court affects more parties and has a greater economic impact than it would if forum choice were more restricted. *See* Petition at 15-19.[10]

Such concerns are surely relevant to this Court's exercise of its discretionary review authority, and they support the grant of this petition. Despite respondent's protestations to the contrary, the existence of a court split on the proper interpretation of section 4(b)(1) and the decision of the court below do have a "profound" effect on an enormous number of employees and employers who have both a right and a need to know which federal regulations govern their employment relationships.

At bottom, respondent's Brief in Opposition does nothing to undermine petitioner's showing that this case presents an important and recurring question of federal law concerning the proper approach in determining the jurisdictional boundaries of the various federal agencies that regulate workplace safety. Moreover, the respondent does not, and cannot, dispute that the decision below could have a longstanding impact that extends far beyond the parties to this case. Given the importance of a definite and certain interpretation of section 4(b)(1) to employees and employers throughout the nation, and the clear presentation of that issue in this case, the Court should grant this petition.

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[10] "One of the purposes of the federal employers' liability act was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 493 n.5 (1980), quoting, H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908).

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

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